TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 234

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY AND THE NEW YORK AND HARLEM RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JANUARY 28, 1901.

(18,028.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 12, 1901.

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a STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 22nd day of June, in the year of our Lord one thousand nine hundred, before the judges of said court.

Witness: the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, June 22nd, 1900.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and Another to Vacate Assessments.

Be it remembered, that on the 16th day of May in the year of our Lord one thousand nine hundred, The New York Central and Hudson River Railroad Company and another the appellants, in this proceeding came here into the court of appeals by Ira A. Place, their attorney, and filed in the said court a notice of appeals and the return thereto from the order of the appellate division of the supreme court in and for the first judicial department. And The City of New York, the respondent in said proceedings afterward appeared in the court of appeals, by John Whalen, corporation counsel, its attorney.

Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals having heard this proceeding argued by Mr. Ira A. Place, of counsel for the appellants and by Mr. Theodore Connoly, of counsel for the respondent, and

b after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York before the justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof etc.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *June* 23*rd*, 1900.

I hereby certify that the preceding record contains a correct transcript of the proceeding- in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.]

W. H. SHANKLAND, *Clerk.*

c In the Court of Appeals.

In the Matter of the Petition of THE N. Y. C. & H. R. R. R. Co. and THE N. Y. & H. R. R. Co. to Vacate Assessments (1) for Regulating, &c., Vanderbilt Avenue East, (2) Paving Park Avenue; Confirmed Feb. 17, 1899.

Papers on Appeal from Order.

Ira A. Place, attorney for petitioners and appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

John Whalen, counsel to the corporation of the city of New York, respondent, 2 Tryon row, borough of Manhattan, N. Y. city, N. Y.

d Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

Statement under Rule 41.

This proceeding was commenced by the service of the petition with notice of motion on John Whalen, Esq., corporation counsel of the city of New York, on the 18th day of March, 1899, and by the application upon such petition to the Honorable Charles H. Truax, a justice of the supreme court, in special term, pursuant to section 959 of the Greater New York charter.

The names of the original parties are as they appear in the above-entitled proceeding in full. No change in parties or attorneys has taken place pending the proceeding.

1 Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

SIR: Take notice that the annexed petition will be presented to the supreme court of the State of New York, at a special term thereof, to be held at special term, part II, in the county court courthouse, in and for the city and county of New York, on the 28th day of March, 1899, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, and that then and there
2 an application will be made to a justice of this court, sitting at said special term, that the proofs and allegations of the parties in respect to the several matters in the said petition set forth be then and there heard, and that thereupon a motion will be made that the prayer of the petitioners be granted.

Dated New York, March 16, 1899.

IRA A. PLACE,
Attorney for Petitioners.

Office and P. O. address, Grand Central station, borough of Manhattan, New York city, N. Y.

To John Whalen, Esq., counsel to the corporation of the city of New York.

Adjourned by consent to April 13, 1899, same time and place.
New York, March 27th, 1899.

JOHN WHALEN,
Corporation Counsel.
G. L. S.

"This matter coming on for a hearing before Hon. Charles H. Truax, one of the justices of this court, on April 13, 1899, on consent of the counsel for the respective parties; it is

Ordered that the testimony be taken before a stenographer at the office of the corporation counsel and presented to me for decision at a time and place to be hereafter determined upon.

CHARLES H. TRUAX, *Justice.*"

3 *Petition Read by Petitioners.*

Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

To the supreme court of the State of New York:

The petitioners in the above-entitled matter respectfully show to this court:

I. That the petitioner The New York and Harlem Railroad Company is a railroad corporation, duly organized and existing under the laws of the State of New York, and is now, and at the date of the confirmation and entry of record of the assessments here-
4 inafter named was, the owner in fee of the premises situated in the twenty-fourth ward, in the borough of the Bronx, in the city of New York, hereinafter specifically mentioned, and upon which the said assessments have been made, laid or imposed.

II. That the petitioner The New York Central and Hudson River Railroad Company is a railroad corporation duly organized and existing under the laws of the State of New York, and is the lessee of the railroad and lands of the petitioner The New York and Harlem Railroad Company, extending from 42d street in the borough of Manhattan, in the city of New York, through the said 24th ward, and to the village of Chatham, in the county of Columbia, under a contract or lease dated April 1, 1873, for a term expiring April 1, 2274, and that as such lessee it is now, and at the date of the confirmation and entry of record of the assessments hereinafter named was, the occupant of the said premises situated in the 24th ward of the borough of the Bronx, in the city of New York, hereinafter specifically mentioned, and upon which assessments have been made, laid or imposed, and was using the said premises for the purpose of its incorporation, and that under the terms of the said contract or lease the said petitioner The New York Central and Hudson River Railroad Company covenants and agrees to pay all taxes, charges or assessments, ordinary and extraordinary, that may be imposed or assessed in any way upon the said lands.

III. That by reason of the making, laying or imposing of said assessments upon the said premises of your petitioners, your petitioners and each of them are aggrieved.

IV. That the assessment first above mentioned for regulat-
5 ing and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from Ward line to

177th street, purports to have been made, laid or imposed under an ordinance of the board of aldermen of the mayor, aldermen, and commonalty of the city of New York, adopted October 23, 1894, approved by the mayor October 31, 1894, a copy of which is hereto annexed and marked "Exhibit A," and made a part of this petition which said ordinance was adopted under and pursuant to the provisions of section 878 of the consolidation act, which was then in full force and effect; and that said assessment secondly above mentioned for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, purports to have been made, laid or imposed under an ordinance of the board of aldermen, of the mayor, aldermen and commonalty of the city of New York, adopted January 5, 1897, approved by the mayor January 19, 1897, a copy of which is hereto annexed and marked "Exhibit B," and made a part of this petition, which said ordinance was adopted under and pursuant to the provisions of section 878 of the consolidation act, which was then in full force and effect.

V. That the assessment first above mentioned for regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from Ward line to 177th street, is an assessment of $4,687.82 made, laid or imposed upon lands described by assessment, block and lot numbers as follows:

Assessment No.	Block No.	Lot No.	Amount.
1	1219	90	
1½	1219	84	
2	1208	6	$4,687.82
3	1180½	1	
4	1146½	1	

6 That the said lands and premises described by assessment Nos., by block Nos. and by lot Nos., as aforesaid, are the lands owned, occupied and used by your petitioners, as hereinbefore set forth.

That the said assessment secondly above mentioned for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, is an assessment of $12,626.72, made, laid or imposed upon lands described by assessment, block and lot numbers, as follows:

Assessment No.	Block No.	Lot No.	Amount.
1	2895	45	
1½	2895	85	
2	2897	5	
3	2898	60	
3	2899	70	
4	2900	90	
4	2900	107	$12,542.03
68	2895	11	84.69
			$12,626 72

That the said lands and premises described by assessment Nos., by block Nos. and by lot Nos. as aforesaid are the lands owned, occupied and used by your petitioners as hereinbefore set forth, and, with the exception of assessment No. 68, block No. 2895, lot No. 11, are the same lands and premises as are described by the assessment Nos., block Nos. and lot Nos. upon which the said assessment first above mentioned was made, laid or imposed.

VI. That the said lands owned, occupied and used as aforesaid by your petitioners are shown by green shading and delineated upon a map or tracing thereof which is hereto annexed and marked "Exhibit C," and hereby made a part of this petition.

7 VII. That *that* the said assessment first above mentioned for regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from ward line to 177th street, was made, laid or imposed by the board of assessors of the city of New York on or before November 15, 1898, and upon notice thereof being given the petitioners appeared before the said board of assessors on or about December 16, 1898, and then and there duly objected and protested against the said assessment and filed written objections thereto, on the ground that substantial error had been made in the making, laying or imposing of the said assessment, and that thereafter the said board of assessors, disregarding the said objections and protest of your petitioners, overruled the said objections of your petitioners and against their protest confirmed the said assessment; and that thereafter and on or about February 17, 1899, your petitioners appeared before the board of revision of assessments of the city of New York, and again objected and protested against the making, laying or imposing of the said assessment, but that the said objections were overruled by the said board of revision of assessments and against said protest of your petitioners said board of revision and assessment confirmed the said assessment, and that the title of said assessment has been entered in the record of the titles of assessments confirmed in the office of the collector of assessments and arrears of said city, and in the office of the comptroller of said city, and constitutes a lien or apparent lien or incum-

brance upon the said lands of your petitioners and a cloud upon the title of your petitioners thereto.

VIII. That the said assessment secondly above mentioned
8 for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, was made, laid or imposed by the board of assessors of the city of New York on or before December 20, 1898, and upon notice thereof being given the petitioners appeared before the said board of assessors on or about January 24, 1899, and then and there duly objected and protested against the said assessment and filed written objections thereto, on the ground that substantial error had been made in the making, laying or imposing of the said assessment, and that thereafter the said board of assessors, disregarding the said objections and protest of your petitioners, overruled the said objections of your petitioners and against their protest confirmed the said assessment; and that thereafter and on or about February 17, 1899, your petitioners appeared before the board of revision of assessments of the city of New York, and again objected and protested against the making, laying or imposing of the said assessment, but that the said objections were overruled by the said board of revision of assessments and against said protest of your petitioners said board of revision and assessments confirmed the said assessment, and that the title of said assessment has been entered in the record of the titles of assessments confirmed in the office of the collector of assessments and arrears of said city, and in the office of the comptroller of said city, and constitutes a lien or apparent lien or incumbrance upon the said lands of your petitioners and a cloud upon the title of your petitioners thereto.

IX. Your petitioners further show that the said lands of your petitioners hereinbefore mentioned and upon which the said assessments have been made, laid or imposed, are held, owned,
9 used and occupied as aforesaid solely, only and exclusively for the purposes of the incorporation of your petitioners, and that all of the said lands which abut or are contiguous to the said Park avenue, or Vanderbilt avenue east, are used solely, only and exclusively for the purposes of the roadway of your petitioners upon which their tracks and over which the trains of your petitioner, The New York Central and Hudson River Railroad Company, are run, and that there are no buildings or other improvements upon the said lands excepting railroad tracks and structures.

X. Your petitioners further show that the grade of the said Park avenue, or Vanderbilt avenue east, is from 10″ 5′ to 18″ 3′ above the level of the grade of the roadway and tracks of your petitioners, as shown upon the cross-sections thereof which are hereto annexed and marked "Exhibit D," which is hereby made a part of this petition, and that there is no access possible from the said lands of your petitioners to the said Vanderbilt avenue east, but, upon the contrary, that the said lands and roadway of your petitioners were heretofore under a contract made by and between the department of public parks in the city of New York and your petitioner, The New York and Harlem Railroad Company, dated January 11, 1888, which said

contract was made, entered into, executed and carried out under the provisions of chapter 721 of the Laws of 1887, depressed to their present grade and solid stone retaining walls built upon and along the easterly and westerly sides of the said lands in order that access to and from public streets and avenues, including that part of Park avenue, or Vanderbilt avenue east, between said ward line and 177th street, should be cut off and rendered impossible.

10 XI. That the total amount of the said assessment first above mentioned for regulating and grading, setting curb-stones, flagging and laying cross-walks in Vanderbilt avenue east, from ward line to 177th street, is $10,994.41, of which the said sum of $4,687.82 was made, laid or imposed upon the land of your petitioners as aforesaid; that the total amount of the said assessment secondly above mentioned for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, is $26,167.14, of which the said sum of $12,626.72 was made, laid or imposed upon the land of your petitioners as aforesaid.

XII. And your petitioners further show that the improvements for which the said assessments have been made, laid or imposed are local improvements, and that in the said proceedings under which the said assessments have been made, laid or imposed substantial errors have been committed, among which are the following:

First. That the said lands owned, occupied and used by your petitioners as aforesaid and upon which said assessments have been made, laid or imposed are not houses and lots within the meaning of the said ordinances and statutes, and that the said lands owned, occupied and used by your petitioners, as aforesaid, have not been, will not be, and cannot be, benefitted in any manner by the said improvements.

Second. That there was and is no authority of law for the assessment upon the said lands owned, occupied and used by your petitioners as aforesaid, and upon which said assessments have been made, laid or imposed for the total cost or any part of the cost of the said improvements.

11 Third. That the cost and expense of the said work in making said improvements have not been distributed equally or in proportion to the benefit upon the houses and lots fronting upon said Vanderbilt avenue east, and upon all the houses and lots benefitted thereby and assessable therefor.

Wherefore, your petitioners pray that the said assessments be vacated and that the lien or liens created thereby, or by any subsequent proceedings, cease, so far as the said assessments affect the said lands owned, occupied and used by your petitioners as aforesaid, and that the collector of assessments and arrears, the clerk of arrears, the comptroller, and the deputy comptroller of the city of New York, be each directed to cancel and discharge said assessments and liens,

or apparent liens, upon the records in their respective offices, so far as the same affect the said lands of your petitioners.

Dated borough of Manhattan, N. Y. city, March 16, 1899.

THE NEW YORK AND HARLEM RAILROAD COMPANY,
By E. V. W. ROSSITER, *Treasurer.*
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, *Treasurer.*
IRA A. PLACE, *Attorney for Petitioners.*

Office and P. O. address, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

12 STATE OF NEW YORK, } ss:
County of New York, }

Edward V. W. Rossiter, being duly sworn, says: that he is the treasurer of The New York Central and Hudson River Railroad Company, and that he is the treasurer of The New York and Harlem Railroad Company, the petitioners above named; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. V. W. ROSSITER.

Sworn to before me this 18th day of March, 1899.

H. B. DWYER,
Notary Public, N. Y. County, N. Y.

13 EXHIBIT A.

In common council.

Resolved, That Vanderbilt avenue east from the ward line to east 177th street be regulated and graded, the curbstones set, sidewalks flagged a space of four feet in width, and cross-walks laid at each intersecting or terminating street or avenue, where not already laid, under the direction of the commissioner of street improvements of the 23rd and 24th wards.

Adopted by the board of aldermen, October 23, 1894, three-fourths of all the members elected voting in favor thereof, having been first advertised as required by law.

Approved by the mayor October 31, 1894.

(Signed) MICHAEL F. BLAKE,
Clerk of the Common Council.

EXHIBIT B.

In common council.

Resolved, That the carriageway of Park avenue (Vanderbilt avenue east) from the 23rd ward line to 177th street be regu-

lated and paved with granite-block pavement and cross-walks laid at each intersecting or terminating street or avenue, where not already laid, under the direction of the commissioner of street improvements of the 23rd and 24th wards.

Adopted by the board of aldermen January 5, 1897, three-fourths of all the members elected voting in favor thereof, having been first advertised as required by law.

Approved by the mayor January 19, 1897.

(Signed) WILLIAM H. TENEYCK,
Clerk of the Common Council.

(Here follow maps marked pp. 13*a* to 13*g* incl.)

14 At a special term of the supreme court of the State of New York, held at part II thereof in the county court-house in the city of New York, on the 21st day of July, 1899.

Present: Hon. Charles H. Truax, justice.

In the Matter of the Petition of THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, as Lessees, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owners, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

The motion for the vacation or reduction of the assessments above mentioned having come on for a hearing before the Hon. Charles H. Truax, one of the justices of this court, on the 13th of
15 April, 1899, and he having ordered, on the consent of the respective parties to this proceeding, that testimony be taken before a stenographer at the office of the corporation counsel, to be presented to the said justice for decision at a time and place to be determined upon, and the said testimony having been taken,

Now, upon reading and filing the petition and notice herein and the said testimony, after hearing Ira A. Place, attorney for the petitioners in favor of the said motion, and George L. Sterling, assistant corporation counsel for the city of New York opposed, and due deliberation having been had, it is, on motion of John Whalen, corporation counsel,

Ordered, that the motion or prayer of the petitioner herein be and the same hereby is denied, with ten dollars costs to the city of New York.

C. H. T., *J. S. C.*

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

16 *Notice of Appeal to Appellate Division.*

Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

SIRS: Take notice that the New York Central and Hudson River Railroad Company, as lessee, and the New York and Harlem Railroad Company, as owner, and each of them, hereby appeal to the appellate division of the supreme court, for the first department, from the order heretofore made and entered in the above-entitled proceeding in the office of the clerk of the county of New
17 York, on the 21st day of July, 1899, and for each and every part of said order.

Dated New York, August 7, 1899.

Yours, etc.,

IRA A. PLACE,

Attorney for The New York Central and Hudson River Railroad Company, as Lessee, and The New York and Harlem Railroad Company, as Owner, Appellants.

Office and P. O. address: Grand Central station, borough of Manhattan, N. Y. city, N. Y.

To John Whalen, Esq., corporation counsel, and William Sohmer, Esq., clerk of the county of New York.

18 Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK & HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessment (1) for Regulating, etc., Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) Paving Park Avenue, Otherwise Vanderbilt Avenue East, from Division Line between 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

APRIL 27TH, 1899.

Appearances.

For the petitioners, Ira A. Place, Esq., R. L. Luce, Esq.
For the city, G. L. Sterling, Esq.

Testimony Taken Pursuant to the Order of Mr. Justice Truax, Made April 13, 1899.

Petitioners offer in evidence:

1. Deed, Gouverneur Morris to the New York & Harlem
19 Railroad Company, dated October 1, 1842, recorded in Westchester county clerk's office, in Liber 108 of Deeds, page 444, January 20, 1845, conveys the roadway from Millbrook north to Old Quarry road, including all the territory from the ward line north to 177th street, the strip of land being 66 feet in width.

This covers all the road-bed affected by the two assessments.

Received in evidence, and marked "Ex. 1."

2. Deed, Charles Bathgate and others to the New York & Harlem Railroad Company, dated January 2, 1854, recorded in Westchester county clerk's office, in Liber 334 of Deeds, page 310, July 19, 1856. Conveys parcel 25 feet x 250 feet, lying west of and adjoining the roadway conveyed by Exhibit 1, with the provision that it "shall be used solely and only for the purposes of a railroad and station-house to be thereon erected, and also that no ardent or intoxicating drinks shall be manufactured or bought or sold on the premises to be used as a beverage, and that no dwelling-house shall be erected on the said premises of less value than $500, and in case the said conditions are not faithfully performed and kept the estate in the said premises of the grantees, or their legal representatives or assigns, or any of them, shall cease and determine, and the said premises shall immediately revert to the grantors, their heirs or assigns." The said premises being also conveyed subject to all the conditions of fencing contained in the deed from Gouverneur Morris to the parties of the first part hereto.

Received in evidence and marked "Ex. 2."

3. Deed, Charles Bathgate and others to the New York & Harlem Railroad Company, dated October 13, 1856, recorded in the
20 Westchester county clerk's office in Liber 346 of Deeds, page 88, November 27, 1856.

Received in evidence and marked "Ex. 3."

4. Deed, Charles Bathgate and others to the New York & Harlem Railroad Company, dated July 27, 1868, recorded in Westchester county register's office, in Liber 686 of Deeds, page 128, August 27, 1868.

Received in evidence and marked "Ex. 4."

5. Deed, Charles Bathgate and others to the New York & Harlem Railroad Company, dated October 30, 1888, recorded in the office of the register of the city and county of New York, in Liber 2165 of Conveyances, pages 310, November 1, 1888.

Received in evidence and marked "Ex. 5."

Exhibits 2, 3, 4 and 5 convey all that part of block 2897 owned by the petitioners and lying westerly of the roadway conveyed by Exhibit No. 1.

6. Petitioners read in evidence charter of the New York & Harlem Railroad Company, chapter 263 of the Laws of 1831; also chapter 242 of the Laws of 1840, giving authority to the New York & Harlem Railroad Company to extend its railroad through the territory in question.

7. Certificate of the extension of the corporate existence of the New York & Harlem Railroad Company for the term of 500 years, from April 16, 1889, filed in the office of the secretary of state, Dec. 28, 1874.

Received in evidence and marked "Ex. 6."

8. Contract, New York & Harlem Railroad Company to the New York Central & Hudson River Railroad Company, dated April 1, 1873, expires April 1, 2274.

Received in evidence and marked "Ex. 7."

21 9. Map, entitled "Map of the village of Morrisania, situated about 1½ miles from the Harlem river, in the manor of Morrisania in the township of West Farms, in the county of Westchester and State of New York." Scale, 100 feet to an inch. Dated West Farms, August 10, 1848. Andrew Findlay, surveyor, etc.

Received in evidence and marked "Ex. 8."

10. Map, entitled "Map of Central Morrisania, being part of the Bathgate farm, situated in the manor of Morrisania, town of West Farms, county of Westchester, New York." Dated Westchester, February 1st, 1851. Andrew Findlay, surveyor.

Received in evidence and marked "Ex. 9."

11. Map, entitled "Map of the village of upper Morrisania, in the town of West Farms, in the county of Westchester, and State of New York, 1848." Dated West Farms, November 11, 1848. Andrew Findlay, surveyor.

Received in evidence and marked "Ex. 10."

12. Map of commissioner of street improvements of the 23d and 24th wards, sections 9 and 14, showing Park avenue or Vanderbilt avenue east throughout the location of the assessments made pursuant to chapter 548 of the Laws of 1890, and the acts amendatory thereof.

13. Read in evidence chapter 721, Laws of 1887. This is the act under which authority was given to the park department, then having jurisdiction over the streets and avenues in the 23d and 24th

ward-, to enter into a contract with the petitioners for the depression of the New York & Harlem railroad.

22 14. Agreement made in pursuance of chapter 721 of the Laws of 1887, between the department of public parks of the city of New York and the New York & Harlem Railroad Company, dated January 11, 1888, with a map annexed thereto.

Received in evidence and marked "Ex. 11."

ARTHUR HAVILAND, being first duly sworn, was examined by Mr. Place and testified as follows:

I live at 623 East 139th street, New York city, and am by profession a civil engineer in the employ of the petitioner, The New York Central & Hudson River Railroad Company. I have been in the employ of the petitioner eleven years. I have been a civil engineer twenty-eight years, and have been almost entirely engaged during that time in railroad work.

I have to do with railroad construction and am familiar with that line of work, and am familiar with the New York & Harlem railroad through its entire extent and present form of construction in the 23d and 24th wards, and was, in a general way as a passenger, not as an employee of the company, familiar with the form of construction of the New York & Harlem railroad in those wards prior to the work done under agreement of January 11, 1888, and I know the form of its construction prior to the improvement of 1888. The grade consisted of two tracks.

At the time that the deed from Gouverneur Morris to the petitioner, Exhibit No. 1, was given, this was substantially farming land, as I understood it, and Railroad avenue east or Park avenue east was not at that time shown on any map, so far as I find from the records. The first record or indication of that avenue which I found was on the maps in evidence marked Exhibits 8, 9 and 10. This avenue was originally called Railroad avenue, and then

23 Vanderbilt avenue east, and now Park avenue east. Throughout the northerly portion of this assessment there was also a Vanderbilt avenue, west, laid out parallel to and adjoining the railroad on the west.

Park avenue east, as it now exists, is shown on the map of the commissioner of street improvements of the 23d and 24th wards.

I am familiar with the provisions of the contract with the department of public parks, dated January 11, 1888, and of the work required to be done under that contract, and it was carried out entirely in accordance with that contract. I prepared the cross-sections of the railroad and of the work done under that contract, which are attached to the petition, and they are correct.

I also prepared other maps, which are attached as exhibits to the petition, being correct copies of the assessment maps.

I will describe, generally speaking, the form of construction of the Harlem railroad, or what was done under the contract of January 11, 1888, within the territory of assessment.

The two tracks of the Harlem railroad were east of the centre line of the railroad company's roadway. The westerly portion of

the company's roadway was excavated at various depths according to the grade given for the depression of the tracks upon the map attached to the agreement and forming part of the agreement with the park department, and in that excavation was constructed the foundation of a retaining wall along the westerly property line of the company's roadway. The retaining wall then continued upward to the surface of the ground as we then found it on the southerly portion of the area of assessment and to the established grade line of Railroad avenue west, as given upon the map before alluded to,
24 and upon the rest of the excavation were constructed two lines of railroad tracks, upon which the traffic of the railroad was then turned. The easterly portion of the roadway of the Harlem railroad was then excavated, and in such trench was constructed the foundation of a retaining wall which was ultimately carried upward to the established grade line of Railroad avenue east, and upon the rest of that excavation was laid two tracks forming the present four-track system of the Harlem railroad. These retaining walls are substantially perpendicular, and at 172d street these walls are 10 feet 6 inches high above the tops of the rails, and at 176th street, 10 feet 5 inches, and at 173d street and Tremont avenue 18 feet 3 inches.

The retaining wall on the easterly side of the railroad throughout the area of assessment is continuous, and it entirely cuts off access from Vanderbilt avenue east to and from the railroad property. On top of this easterly retaining wall there is a coping stone ten inches deep, and easterly of this coping and along the easterly line of the company's roadway is constructed a high picket fence of wood about eight feet high. The purposes of this wall and the picket fence are to prevent access from Vanderbilt avenue east.

This coping stone is above the grade line of the street. The bottom of the coping stone corresponds with the established grade line. The coping is entirely above the grade line of the street.

The lands of the petitioners which have been assessed in these proceedings are used for railroad purposes alone.

Q. Does either the regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from the ward line to 177th street, or the paving of Park avenue, otherwise Vanderbilt avenue east, from the division line between
25 the 23d and 24th wards to 177th street, in any manner benefit these lands?

This question is objected to by counsel for the city on the ground that it has been already determined by the board of assessors and the board of revision of assessments that the property is benefitted, and their decision cannot be attacked in this manner. That the question of whether the property is benefitted or not by the improvements is a matter within the jurisdiction of said assessors, and cannot be attacked collaterally.

A. It does not.

Q. Does the work specified in the last question, or any part of it, in any manner benefit the said lands of the petitioners assessed for railroad purposes?

Same objection.

A. It does not.

Q. It appears from the petition that the lands of the petitioner have been assessed in the sum of $4,687.82 for regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from the ward line to 177th street. Assuming that to be true, how much is that assessment increased over the fair value to this property of the improvement?

Objected to on the same ground, and, furthermore, that there is no testimony as to what is the fair value of the improvement. That the fair value of the improvement, as used in the statutes, means the fair cost to the city of New York of the actual work of construction, without regard to the fair value with reference to the property of the petitioner.

A. By $4,687.82.

Q. It appears from the petition that the property of the
26 petitioner has been assessed for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, in the sum of $12,626.72. Assuming that to be true, how much is the assessment increased beyond the fair value to this property of the improvement?

Same objection as before.

A. $12,626.72.

Q. What is the fair value of each of these improvements to this property?

Same objection as before.

A. Nothing.

Q. Is the*ir* any value, fair or otherwise, to the property of the petitioner in these improvements, or either of them?

Same objection.

A. No, sir.

This roadway is now substantially entirely occupied by the four tracks of the railroad and these retaining walls and the foundations of the retaining walls. This roadway is used for no other purpose excepting the running of railroad trains.

Q. And cannot be used for any other purpose?

Objected to.

A. No, sir.

By Mr. STERLING:

I do not mean to intimate there was anything fraudulent in the actual construction of these works, in other words, I do not mean to claim that the cost of the work to the city was any more than a fair and reasonable cost for the construction of the work done, but simply that in my opinion the property of the railroad is not benefitted by these improvements. This property, as I understand, consists of

two parts, a strip of land about 66 feet wide on which are laid four railroad tracks and the foundation of the retaining wall, but
27 a part of this land is not used for those purposes; that is to say, a part of the land lies westerly of the railroad bed and has no railroad tracks upon it. There is nothing on this land; it is vacant and unimproved.

The two nearest stations of the railroad to these improvements are, one at Wendover avenue near its southerly end, and one at Tremont avenue at the extreme northerly end of the area of assessment of the improvement.

These streets upon which these improvements were constructed are part of the street system leading to and from these stations, and the avenue is contiguous to the railroad on the easterly side. These stations are passenger stations, and certain trains of the petitioner's stop for the receiving and discharging of passengers at certain times, and a person coming to or going from one of these stations would or could pass over these roads.

About 16 feet is the space in height above the top of the rail allowed for trains to pass. So that the grade at these points is 18 feet 3 inches above the top of the rail to the surface of the street at the stations.

By Mr. PLACE:

This land lying west of the roadway, which was referred to by counsel on the other side, and which I testified was not occupied by tracks, is also cut off from access to Railroad avenue east by this retaining wall. The retaining wall and the picket fence also cut off access to and from this land.

Take this station, Wendover avenue; the principal approach to that station is Wendover avenue from the east and west. And the other station at Tremont avenue; the main line of approach to that is east and west on Tremont avenue by trolley cars and otherwise, and the entrances are from those streets east and west. This
28 avenue in question, Vanderbilt avenue east or Park avenue east is a means of approach to the station, just the same as Third avenue or any other avenue that a person desiring to take a train might traverse; that is, this avenue in question affords no special facilities for getting to the station. There is no entrance to these stations from Vanderbilt avenue east. This retaining wall which was on the east side supports this avenue. The work which was done under the contract of January 11, 1888, was done wholly at the expense of the petitioners. September, 1842, is about the date of the commencement of the operation of the New York & Harlem railroad over this territory, open to the public to Williamsbridge.

Adjourned to Monday, May 1st, 1899.
Further adjourned to May 5th, 1899.

MAY 5TH, 1899.

Same Appearances.

Petitioner offered in evidence proceedings by the city to acquire title to the land within the lines of Vanderbilt avenue east, within the territory affected by the assessments mentioned in the petition.

Received in evidence and marked "Exhibit 12."

Also read in evidence section 878 of the consolidation act.

Offered in evidence book entitled Borough of the Bronx, No. 5665, assessment-list for regulating, grading, curbing, flagging and laying cross-walks in Vanderbilt avenue east from ward line to 177th street, together with a list of awards for damages caused by a
29 change of grade. Received May 10, 1898, advertised November 15, 1898, confirmed by the board of revision of assessments February 17, 1899, entered February 17, 1899.

Received in evidence and marked "Exhibit 13."

Also book entitled Borough of the Bronx, No. 5688, assessment-list for paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue from the 23d ward line to 177th street. Received May 21, 1898, advertised December 20, 1898, confirmed by the board of revision of assessments February 17, 1899.

Received in evidence and marked "Exhibit 14."

Offered in evidence objections filed on behalf of the petitioner, with the board of assessors, in the matter of paving, &c., with granite-block pavement Park avenue from 23d ward line to 177th street, Vanderbilt avenue east (No. 5688).

Received in evidence and marked "Exhibit 15."

Also objections of the petitioner before the board of assessors in the matter of the assessment for regulating and grading, setting curbstones, flagging and laying cross-walks on Vanderbilt avenue east from ward line to 177th street, No. 5665.

Received in evidence and marked "Exhibit 16."

Also communication from board of assessors transmitting assessment-list for revision and correction, paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue from the 23d ward line to 177th street, No. 5688, dated February 3, 1899.

Received in evidence and marked "Exhibit 17."

30 Also communication from the board of assessors transmitting to the board of revision of assessments assessment-list for revision and correction, regulating, grading, curbing, flagging and laying cross-walks in Vanderbilt avenue east from the ward line to 177th street, together with a list of awards for damages caused by a change of grade, No. 5665, dated January 24, 1899.

Received in evidence and marked "Exhibit 18."

Offered in evidence map entitled *In re* paving Vanderbilt avenue east, petition of the New York Central & Hudson River Railroad Company, and another, profile of the retaining wall along the easterly side of the New York & Harlem railroad, sustaining Vanderbilt avenue east, between 170th street and Tremont avenue, taken from the map annexed to the agreement of the department of public

parks, dated September 5, 1887, and showing the measured heights at intersecting streets.

Received in evidence and marked "Exhibit 19."

ARTHUR HAVILAND, recalled for petitioners:

By Mr. PLACE:

I made this map (Exhibit 19), and it is a correct copy. It represents the longitudinal or side view of this retaining wall, and shows also the grade of Vanderbilt avenue east, as now established, by heavy black line marked "Grade of Vanderbilt avenue, east." That is the retaining wall which cuts off all access to and from the railroad company's property and Vanderbilt avenue.

EDGAR VAN ETTEN, being duly sworn, testified:

By Mr. PLACE:

31 I reside in the city of New York, and am the general superintendent of the railroads owned and leased by the New York Central & Hudson River Railroad Company, including the New York & Harlem railroad. I know the Harlem railroad and that part of it extending from ward line between the 23d and 24th wards northerly to 177th street and am well acquainted with it and the territory affected by this proceeding.

As general superintendent of these railroads I have general charge of the property and railroads, and charge of the operation of the railroads. I have been in the railroad business 32 years. During that time I have occupied almost all positions, from brakeman up to general superintendent, including that of division superintendent of various railroads, among others the Erie, Lehigh Valley and Rome & Watertown. I am familiar with the manner of construction of that part of the Harlem railroad I have mentioned, and its depression below the surface of the surrounding land. I call attention to Petitioner's Exhibit 19, showing that solid stone retaining wall on the easterly side of the railroad within this territory. I am familiar with that wall; it looks familiar. I know that Vanderbilt avenue east, in question, is immediately east of and adjoining this retaining wall. There is no public access to or from the railroad property and Vanderbilt avenue east: it is cut off by this retaining wall. There is, I think, at that point, on top of this retaining wall a picket fence, which further shuts off access.

Q. State whether the regulating, grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from this ward line to 177th street benefits in any manner the railroad property assessed in this proceeding?

Same objection as to question in previous examination.

A. I can't see how there would be any benefit.

32 Q. State whether the paving of Vanderbilt avenue east, within these limits in any manner benefits that property?

Same objection.

A. I can't see how.

Q. This petition shows that for regulating, grading, etc., of this avenue the property of the railroad has been assessed in the sum of $4,687.82; that being the case, in what amount has the property been assessed in excess of the fair value of the improvement to this property?

Same objection.

A. The total amount, without any question.

Q. And it appears in evidence that the property of the railroad company has been assessed for paving this Vanderbilt avenue east, within the limits mentioned, in the sum of $12,626.72; that being the case, in what amount is the property of the railroad assessed in excess of the fair value of the improvement?

Same objection.

A. I don't consider that the railroad is benefited or improved in any way, shape or manner.

By Mr. STERLING:

The nearest bridge across the railroad track to this land is one at 172d street, that is the nearest within the territory, and persons and vehicles can go over the railroad track at this point from one side to the other. Further to the north the next bridge across is, I think, at 178th street.

When I speak of benefit to the railroad, I mean benefit to the railroad company or to the land of the railroad company or either or both.

Q. Suppose buildings or structures of any sort were built on this land of which we are speaking, would the regulating and paving of this Vanderbilt avenue, in your opinion, benefit the property at all?

33

A. It would benefit the houses that were along it, undoubtedly.

Q. So that if the railroad company would build buildings on this land they would be benefitted by these improvements? I am speaking of the land owned by the railroad company, both the roadway and the land west of the roadway on which there are no tracks?

A. I don't see how it would benefit the railroad property in any way on the west.

Q. Not so long as it is used for its present purposes, you mean?

A. I don't see how the paving of Vanderbilt avenue on the east side of the depression on which the railroad tracks run would be of any benefit to the small amount of property we own on the west side of those tracks.

Q. Suppose buildings were put upon it would it then benefit it?

A. No, sir, I don't see how.

Q. Suppose a steel structure should be built over the cut as it is now, 12 or 13 stories high, and rented out to tenants, do you think this street, Vanderbilt avenue, would be of any benefit to the property?

A. It might be, but I don't see how the railroad could be interested in that.

Q. There would be no engineering difficulty in building a structure ten stories high, if you pleased, over the track; the railroad could still run under it, couldn't it? It wouldn't interfere with the use of the railroad property?

A. Possibly that might be done.

Q. That might be a good office building, for instance?

A. It might be; yes, sir.

Q. There is nothing to prevent their doing it?

A. I assume not; there is no physical difficulty.

Q. There is no more difficulty in their building on that land than on any other land?

A. There is no physical difficulty, but there is a very strong improbability that they ever will.

34 By Mr. PLACE:

In the first place, I do not consider the erection of any sort of structure over this depressed cut as at all practical; it wouldn't be undertaken by the railroad company, it would be very objectionable.

I call attention to "Exhibit 19," and to the fact that at various points, as for instance at Bathgate avenue, the retaining wall and also the grade of Vanderbilt avenue east, is only about 11 feet 1 inch above the tops of the rails; that would not be sufficient so that buildings could be erected at that grade and trains operated under it; and at various other points, as at 176th street, the same condition would prevail; it would be necessary to have 15 feet, and that would require the re-regulating and grading of the avenue.

WILLIAM H. JASPER, being duly sworn, testified:

By Mr. PLACE:

I live in New York city, and am in the service of the city as secretary of the board of assessors, and have been secretary of the board during the time the present city charter has been in force, and about twenty-five years before, under the consolidation act. I have general charge of the office and of the proceedings before the board of assessors as secretary of the board.

Q. As a matter of fact, and in the ordinary routine of business, are you practically the executive officer of the board?

A. I am under the directions of the board. I see that all the proceedings which come before the assessors are correct in form and are properly brought before the board; that is part of my duty. They have regular meetings, and as occasion requires. The regular meetings of the board are once a week, and if there are matters of business which require its attention, oftener. The president
35 directs me to call a meeting. There are five assessors, and three of them constitute a quorum. Under the city charter the entire board acts for all boroughs.

Take first this proceeding for regulating and grading, setting

curbstones, flagging and laying cross-walks in Vanderbilt avenue east. The first paper which I would receive in that proceeding is the return from the department having charge of the execution of the work. In that case it would be from the commissioner of highways, certifying the sum total cost of the work. The next action taken is that the board of assessors transmit that to the comptroller, who furnishes the board with an interest certificate based upon payments made to the contractor from time to time during the execution of the work. The aggregate of these two certificates form the basis of the assessment. Both of those papers are included in the book No. 5665, Petitioners' Exhibit 13. The next thing done, after I get those figures, is that the board of assessors levy the cost of the work. The original certificate from the commissioner of highways is attached to a map showing the area of assessment which has been previously determined upon by the board of assessors.

Q. What information does the board of assessors have before them at the time when the area of assessment is determined?

A. They have a fixed rule governing works, and the departments are instructed to furnish areas on certain works, unless some unusual conditions exist that would warrant a change. The area of assessment in this particular case was fixed in the map which was received by the board of assessors from the commissioner of highways.

Q. And the commissioner of highways made that map or had it made under his direction?

36 A. The surveyor in charge of the work makes the map.

Q. And the area of assessment in this particular case extending along the sides of Vanderbilt avenue east and for half a block east and west, was fixed by that certificate and that map furnished by the commissioner of highways?

A. It was fixed by the board of assessors; it was shown on this map furnished by the commissioner of highways. That map is in this book (Exhibit 13).

Q. The assessors have adopted a general rule that the area of assessment in improvements of this kind shall be each side of the street improved and for one-half a block on either side?

A. Generally. The next step taken after that map is furnished is that the board of assessors proceeds to distribute the amount over the parcels in accordance with the benefit which they think each parcel receives.

Q. Take the parcels on the east side of Vanderbilt avenue east; they fix so much the front foot?

A. On the east side they bore a larger proportion than the front foot, because the return showed curbing and flagging sidewalks which didn't show on the other. As a matter of fact, in this case the map which was furnished by the commissioner of highways was accepted by the board of assessors as showing the correct area of assessment, but it was furnished under the direction of the board of assessors.

Q. The map which was furnished by the commissioner of highways in this case was accepted by them?

A. It was ordered by the board of assessors. The same course of procedure in general was followed in the assessment for paving with granite block, shown in book 5688, Petitioners' Exhibit 14.

A similar certificate received from the commissioner of highways, and from the comptroller, showing the sums expended and
37 the interest, and those two added together, and attached to the commissioner of highway's certificate, was the map showing the area of assessment which was adopted by the board, and all of those papers are in this book. After the receipt of those papers the total amounts as shown by the certificate of the commissioner of highways and the comptroller is distributed and assessed upon the lots in the assessment district, as shown by these books.

In the matter of paving, the map which was furnished by the commissioner of highways was accepted as showing the correct area of assessment, which is the same in both cases. Upon each of these assessments I was present when the objections of the petitioners were presented by Mr. Luce.

Q. Was it stated in substance by the board at the time that they took official notice of the physical situation, which is shown on the maps, copies of which are attached to the petition, and of the location and depression of the railroad?

A. I presented at the meetings all papers that were filed by the attorneys representing the railroad company.

It is conceded that on the filing of objections by petitioners, petitioners offered to introduce evidence showing that the physical condition of the road was the same as it is shown to be by the evidence offered in this proceeding, and that the board stated it was unnecessary to introduce such evidence at that time, as they knew such to be the physical situation of petitioners' land, and on that ground declined to receive such evidence.

I don't know whether, for the purpose of levying these particular assessments, any member of the board visited these grounds
38 personally or not; I have no knowledge that they did, and would not be apt to know it if they did.

By Mr. STERLING:

Q. Some evidence has been given as to the maps attached to these assessment-lists. I want to ask you whether these maps show the area of benefit as determined upon by the board of assessors?

A. They are in accordance with the directions of the board of assessors to the surveyor in charge of the work.

Q. They fixed the area of assessment as the assessors thought it should be?

Objected to.

Q. State the facts.

A. The board of assessors fixed the area of assessment as shown in this assessment-roll.

By Mr. PLACE:

Q. After they get this map?

A. No, sir, in advance; the fixing in advance is a general one, and the man who makes those maps is under the control of the board of assessors. The rule of the board of assessors under which the property on each side of the street improved one-half block either way is assessed, is a general one which they have adopted for property generally, and it is that general direction that the surveyor acts upon in making up each specific case, as these two in controversy here.

By Mr. STERLING:

Q. Did the board of assessors or the surveyor of the board of assessors determine this area of benefit as is shown here?

A. The board of assessors determined it.

39 EXHIBIT 1.

Deed conveying all of the road-bed affected by the two assessments. Offered by petitioners.

Gouverneur Morris to the New York & Harlem Railroad Company, dated October 1, 1842, recorded in Westchester county clerk's office, in Liber 108 of Deeds, page 444, Jan. 20, 1845. Conveys the roadway from Millbrook north to Old Quarry road, including all the territory from the ward line north to 177th street, a strip of land being 66 feet in width. This covers all of the road-bed affected by the two assessments. Deed not printed in full by consent of the parties.

EXHIBIT 2.

Deed conveying part of block 2897 owned by the petitioners and lying westerly of the roadway conveyed by Exhibit One. Offered by petitioners.

Deed Charles Bathgate and others to the New York & Harlem Railroad Company, dated January 2, 1854, recorded in the Westchester county clerk's office in Liber 334 of Deeds, page 310, July 19, 1856. Conveys parcel 25 feet x 250 feet lying west of and adjoining the roadway conveyed by Exhibit One, with the provision that it "shall be used solely and only for the purposes of a railroad and station-house to be thereon erected, and also that no ardent or intoxicating drinks shall be manufactured or bought or sold on the premises to be used as a beverage, and that no dwelling-house shall be erected on the said premises of less value than $500, and in case the said conditions are not faithfully performed and kept the estate and the said premises of the grantees or their legal representatives or assigns, or any of them, shall cease and determine, and the said premises shall immediately revert to the grantors, their heirs
40 or assigns; the said premises being also conveyed subject to all the conditions of fencing contained in the deed from Gouverneur Morris to the parties of the first part thereto." Deed not printed in full by consent of parties.

EXHIBIT 3.

Deed confirming Exhibit Two. Offered by petitioners.

Deed Charles Bathgate and others to the New York & Harlem Railroad Company, dated October 13, 1856, recorded in the Westchester county clerk's office in Liber 346 of Deeds, page 88, November 27, 1856. Conveys same premises as described in Exhibit Two. Deed not printed in full by consent of parties.

EXHIBIT 4.

Deed conveying property to the west of the roadway. Offered by petitioners.

Deed conveying part of block 2897, owned by the petitioners and lying westerly of the roadway conveyed by Exhibit One. Deed Charles Bathgate and others to the New York & Harlem Railroad Company, dated July 27, 1868, recorded in Westchester county register's office in Liber 686 of Deeds, page 128, August 27, 1868. Conveys a part of block 2897 now owned by the petitioners and lying westerly of the roadway conveyed by Exhibit One. Deed not printed in full by consent of parties.

EXHIBIT 5.

Deed conveying part of block 2897 owned by the petitioners and lying westerly of the roadway conveyed by Exhibit One. Offered by petitioners.

41 Deed Charles Bathgate and others to the New York & Harlem Railroad Company, dated October 30, 1888, recorded in the office of the register of the city and county of New York in Liber 2165 of Conveyances, page 310, on November 1st, 1888, and conveys a part of block 2897, owned by the petitioners and lying westerly of the roadway covered by Exhibit One. Deed not printed in full by consent of parties.

EXHIBIT 6.

Certificate of the extension of the corporate existence of the New York & Harlem Railroad Company for the term of 500 years from April 16, 1889, filed in the office of the secretary of state December 28, 1874. Offered by petitioners. This exhibit is not printed by consent of the parties.

EXHIBIT 7.

Contract of the New York & Harlem Railroad Company to the New York Central & Hudson River Railroad Company, dated April 1, 1873, expires April 1, 2274. Offered by petitioners. This exhibit is not printed by consent of the parties.

EXHIBIT 8.

Map of the village of Morrisania. Offered by petitioners.

Map entitled "Map of the village of Morrisania situated about

1½ miles from the Harlem river in the manor of Morrisania in the township of West Farms, in the county of Westchester in the State of New York. Scale 100 feet to the inch. Dated West Farms, August 10, 1848. Andrew Findlay, surveyor," etc. This map is not printed by consent of the parties.

42 EXHIBIT 9.

Map of central Morrisania. Offered by petitioners.

Map entitled "Map of Central Morrisania being part of the Bathgate farm, situated in the manor of Morrisania, town of West Farms, county of Westchester, New York, dated Westchester, February 1, 1851. Andrew Findlay, surveyor." This map is not printed by consent of the parties.

EXHIBIT 10.

Map of the village of Upper Morrisania. Offered by petitioners.

Map entitled "Map of the village of Upper Morrisania in the town of West Farms, in the county of Westchester and State of New York, 1848, dated West Farms, November 11, 1848. Andrew Findlay, surveyor." This map is not printed by consent of the parties.

EXHIBIT 11.

Agreement for the depression of the New York & Harlem railroad. Offered by petitioners.

Agreement made in pursuance of chapter 721 of the Laws of 1887 between the department of public parks of the city of New York and the New York & Harlem Railroad Company, dated January 11, 1888, with the map annexed thereto. This exhibit is not printed by consent of the parties.

EXHIBIT 12.

Proceedings of the city to acquire title to Vanderbilt avenue, east, within the territory affected by the assessments mentioned in the petition. Offered by petitioners.

43 Proceedings entitled in the matter of the application of the commissioners of the department of public parks for and on behalf of the mayor, aldermen, and commonalty of the city of New York relative to acquiring title to that certain street or avenue called Railroad avenue, east from the Harlem river to 161st street in the 23d ward of the city of New York. Report of commissioners confirmed August 11, 1887; from which order an appeal was taken to the general term and is reported in 47 Hun, page 302. This exhibit is not printed by consent of the parties.

EXHIBIT 13.

Assessment-list for regulating, grading, etc., Vanderbilt avenue, east, being the first list mentioned in the title to these proceedings. Offered by petitioners.

We, the subscribers, persons duly appointed, qualified and constituted as the board of assessors, and duly authorized and empowered to make a just and equitable assessment of the expense of conforming to a certain ordinance of the common council of the city of New York, passed on the 23d day of October, 1894, entitled "An ordinance that Vanderbilt avenue, east, from the ward line to East 176th street be regulated and graded, the curbstones set, the sidewalk flagged, a space four feet in width and cross-walks laid at each intersecting and terminating street or avenue where not already laid, under the direction of the commissioner of street improvements of the 23rd and 24th wards," and of executing and doing the work necessary to be done and required thereby among the owners or occupants of all the houses and lots intended to be benefitted thereby in proportion as nearly as may be to the advantage
44 which each shall be deemed to acquire, having first taken the oath required by law do hereby certify to the board of revision and correction of assessments that we have according to law ascertained the amount of such expense at the sum of twelve thousand two hundred and thirty-six dollars and twenty-seven cents as follows; that is to say,

Contract		$9,448.89
Awards for damage by reason of change of grade	$300.00	
Expenses connected therewith:		
Surveying	1,027.52	
Inspecting	518.00	
Interest	941.86	
		$2,487.38
Total		$12,236.27

and that we have according to law made a just and equitable assessment thereof as follows; that is to say,

In common council.

Resolved, That Vanderbilt avenue east, from the ward line to East 177th street, be regulated and graded, the curbstones set, the sidewalks flagged, a space four feet in width and cross-walks laid at each intersecting and terminating street or avenue where not already laid, under the direction of the commissioner of street improvements of the 23rd and 24th wards, adopted by the board of aldermen October 23, 1894, three-fourths of all the members elected

voting in favor thereof, having been first advertised, as required by law.

Approved by the mayor, October 31, 1894.

(Signed) MICHAEL F. BLAKE,
Clerk of the Common Council.

45 No. 4180.

City of New York, finance department.

COMPTROLLER'S OFFICE, *June* 11, 1896.

Pursuant to the provisions of section 868 of the New York city consolidation act of 1882, and section 946 of the Greater New York charter, the comptroller of the city of New York hereby certifies to the board of assessors of said city that the sum of nine hundred and forty-one and $\frac{86}{100}$ dollars ($941.86) is the amount of interest accruing at the rate of six per cent. per annum upon the several instalments advanced or payments made by the city on account of the work of regulating and grading, setting curbstones, flagging, and laying cross-walks in Vanderbilt avenue east, from the ward line to 177th street, performed under a contract by the commissioner of street improvements of the 23rd and 24th wards with George Clark, dated April 2, 1896, the said interest being calculated from the time of such payment or advance by the city to a day, sixty days after the date of this certificate.

BIRD S. COLER,
Comptroller.

Office of commissioner of street improvements, 23rd and 24th wards.

NEW YORK, —— —, 189-.

Regulating and grading, setting curbstones, flagging the sidewalks, and laying cross-walks in Vanderbilt avenue east from the ward line to 177th street.

I certify to the board of assessors that the contract for the
46 above work was awarded to George Clark April 2, 1896, at the prices annexed, and that the same has been returned as properly completed, and has been accepted by this department. The apportionment of the assessment may be made.

And I further certify in pursuance of section 5, chapter 556, Laws of 1880, that the total amount of expense incurred by the mayor, aldermen and commonalty is as follows:

Ordinance October 31, 1894.

Amount and kind of work.	Contract price.	Amount.
		Dollars. Cents.
3,021.7 cubic yards of earth excavation	.35	$1,057.60
2,893.6 cubic yards of filling	.01	28.94
7,992.7 lineal feet of new curbstone furnished and set	.55	4,395.99
15,458.9 square feet of new flagging furnished and laid	.17	2,628.01
1,124.8 square feet of new bridge stone furnished and laid	.50	562.40
443.4 cubic yards of dry rubble masonry	1.75	775.95
Surveyor's fees		1,027.52
Inspector's fees, 148 days, per day @	3.50	518.00
		10,994.41

Over-contract time charged to contractor April 6, 1898.

JAMES H. MALONEY,
Deputy Commissioner of Highways, Borough of the Bronx.
JAMES P. KEATING,
Commissioner of Highways.

I certify that the above amounts and prices annexed upon which the contract was awarded are correct.

C. C. CLARKE,
Chief Clerk, Secretary, Deputy of Highways, Borough of the Bronx.

47 *Assessment-list No.* 5665.

Board of assessors.

NEW YORK, *August* 13, 1898.

I have compared the maps attached to this assessment-list with the tax maps, also the map, block and ward numbers on said list, and find same correct.

JAMES F. EGAN, *Clerk.*

Assessment-list for regulating and grading, setting curbstones, flagging the sidewalks, and laying cross-walks in Vanderbilt avenue east from the ward line to 177th street.

48

Description of property.	Map No.	Street No.	Block No.	Ward No.	Owner.	Feet front.	Feet of curb and gutter.	Feet of curb and gutter reset.	Amount.
					Vanderbilt avenue east, westerly side, beginning at the ward line and running northerly.				
Ward line and southwest corner Vanderbilt avenue east and Wendover avenue	1	1219		90	Harlem Railroad Co.				
					549.62				
					66.				
					66.11				
	1½	1219		84	Harlem R. R.	681.73	1,058.90		
					403.80				
					66.				
Northwest corner Wendover avenue and southwest corner 173d St	2	1208		6	New York & Harlem R. R.	469.80			
					Vanderbilt Ave. E. 1,226.80				
					Wendover Ave 75.70				
					173d St 66.08				
Northwest corner 173d St. and southwest corner 175th St	3	1180½		1	N. Y. & Harlem R. R.	1,368.58	1,240.50		4,687.82
					Vanderbilt Ave. E. 962.74				
					173d St 33.04				
					175th St 66.				
Northwest corner 175th St. and southwest corner 177th St	4	1146½		1	N. Y. & Harlem R. R.	1,061.78	971.50		
					175th St 66.				
					Vanderbilt Ave. E. 780.04				
						846.04	763.70		
					Vanderbilt avenue east, easterly side, beginning at the southeast corner of Vanderbilt avenue east and 177th St. and running southerly.				
Southeast corner 177th St	5	1147		17	J. Paulsen	54.76	.29		42.94
	6	1147		14	Mrs. Francis	40.00	40.00		48.99
						4,760.82	4,103.60		4,779.75

49 Confirmed by the board of revision of assessments February 17, 1899.

EDGAR J. LEVEY,
Chief Clerk.

Charge collector of assessments and arrears, $12,236.27.
Department of finance, New York, February 25, 1899.

J. E. BARRETT,
Gen. Book-keeper.

NEW YORK, *Jan.* 24, 1899.

Edward McCue, John B. Meyenborg, Thomas A. Wilson, board of assessors:

Entered in the bureau for correction of assessments and arrears, February 17, 1899.

EDWARD GILON,
Collector of Assessments and Arrears.

EXHIBIT 14.

Assessment-list for paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue, being the second-mentioned list in the title to these proceedings. Offered by petitioners.

No. 5688.

We, the subscribers, the persons duly appointed, qualified and constituted as the board of assessors, and duly authorized and empowered to make a just and equitable assessment of the expense of conforming to a certain ordinance of the common council of the city of New York, passed on the 5th day of January, 1897, entitled "An ordinance that the carriageway of Park avenue (Vanderbilt avenue east) from the 23rd ward line to 177th street be regulated and paved with granite-block pavement, and cross-walks laid at each intersecting and terminating street and avenue where not already
50 laid under the direction of the commissioners of street improvements of the 23rd and 24th wards, and of executing and doing the work necessary to be done and required thereby among the owners or occupants of all the houses and lots intended to be benefitted thereby in proportion as nearly as may be to the advantage which each shall be deemed to acquire, do hereby certify that we have according to law ascertained the amount of such expense at the sum of twenty-six thousand one hundred and sixty-seven dollars and fourteen cents, as follows, that is to say:

Contract		$23,626.97
Expenses connected therewith:		
Surveying	$947.57	
Inspecting	259.00	
Interest	1,333.60	
		2,540.17
		$26,167.14

and that we have according to law made a just and equitable assessment thereof as follows, that is to say:

In common council.

Resolved, That the carriageway of Park avenue (Vanderbilt avenue east) from the 23d ward line to 177th street be regulated and paved with granite-block pavement, and cross-walks laid at each intersecting or terminating street and avenue where not already laid under the direction of the commsssioner of street improvements of the 23d and 24th wards, adopted by the board of aldermen January 5, 1897, three-fourths of all the members elected voting in favor thereof, having been first authorized as required by law. Approved by the mayor January 19, 1897.

(Signed) WILLIAM H. TEN EYCK,
Clerk of the Common Council.

51 4203.

The city of New York, finance department.

COMPTROLLER'S OFFICE, *June* 11, 1898.

Pursuant to the provisions of section 868 of the New York city consolidation act of 1882, and section 946 of the Greater New York charter, the comptroller of the city of New York hereby certifies to the board of assessors of said city that the sum of thirteen hundred and thirty-three $\frac{60}{100}$ dollars ($1,333.60) is the amount of interest accruing at the rate of six per cent. per annum upon the several instalments advanced or payments made by the city on account of the work of regulating and paving, laying cross-walks in Park avenue from the 23d ward line to 177th street, performed under a contract by the commissioner of street improvements of the 23d and 24th wards with Charles Mitchell, dated April 8, 1897, the said interest being calculated from the time of such payment or advance by the city to a day sixty (60) days after the date of this certificate.

BIRD S. COLER,
Comptroller.

Office of commissioner of street improvements, 23d and 24th wards.

NEW YORK, *May* 21, 1898.

Regulating and paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue from the 23d ward line to 177th street.

I certify to the board of assessors that the contract for the above work was awarded to Charles Mitchell April 8, 1897, at the prices annexed, and that the same has been returned as properly completed and has been accepted by this department. The apportion-
52 ment of the assessment may be made. And I further certify, in pursuance of section 5, chapter 556, Laws of 1880, that the total amount of expenses incurred by the mayor, aldermen and commonalty is as follows:

Ordinance, January 19, 1897.

Amount and kind of work.	Contract price.	Amount.
		Dollars. Cents.
15,756.06 square yards new granite-block pavement. . .	1.48	$23,319.77
768 square feet new bridge stone	.40	307.20
Surveyor's fees		947.57
Inspector's fees, 74 days	3.50	259.00
		24,833.54

Over-contract time charged to contractor.
May 17th, 1898.

JAMES P. KEATING,
Commissioner of Highways.
JAMES H. MALONEY,
Deputy Commissioner of Highways, Borough of the Bronx.

I certify that the above amounts and prices annexed, upon which the contract was awarded, are correct.

C. C. CLARKE,
Chief Clerk, Secretary, Deputy of Highways, Borough of the Bronx.

Assessment No. 5688.

Board of assessors.

NEW YORK, *August* 15, 1898.

I have compared the maps attached to this assessment-list with the tax maps, also the map, block and ward numbers on the said list and find the same correct.

JOHN L. KIERNAN, *Clerk.*

February 2, '99.

Assessment-list for regulating and paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue from the 23rd ward line to 177th street.

53

Description of property.	Map No.	Block No.	Ward No.	Owner.	Front lin. feet.	Amount. Dolls.	Cts.
				Park avenue, westerly side, beginning at the ward line and running northerly.			
Ward line to Wendover Ave.	1	2895	45	N. Y. & Harlem R. R. Co.			
		*1219	*90	403.80 Park Ave. E..... 66.			
		2895	*84	66. St. Paul..... 549.62			
	1½	*1219	85	66. 171st St..... 66.11			
Wendover Ave. to 173d St.	2	2897	*84		681.73		
		*1208	56	Do.	535.80		
				Wendover Ave... 75.70			
				Park Ave. E..... 1,286.80			
				173d St..... 66.08			
					1,368.58		
173d St. to 175th St.	3	2898	60	Do.			
				174th St..... 66.			
	8	*1180½		173d St..... 33.04		12,542	63
		2899	70	Park Ave. E..... 912.74			
				175th..... 33.			
175th St. to 177th St.	4	2900	90		1,044.78		
		*1146½	107	Do.			
				175th St..... 33.			
				Park Ave. E..... 730.05			
				177th St..... 33.39			
				176th St..... 66.			
					862.44		
				Park avenue, easterly side, beginning at the southeast corner of 177th street and running southerly.			
Corner of 177th St. and Park Ave. east.	5	2909	12	J. Paulsen.			
		*1147	*17	177th St..... 60.70			
				Park Ave. E..... 54.76			
					115.46	138	26
	6	"	10	Mrs. Francis.....	40.00	136	68
			*14				
	7	"	5	H. Tarbox.....	108.00	368	99
			*7				
Northeast corner 176th St. and Park Ave. east.	8	"	1	Mrs. Lent.			
			*1	Park Ave. E..... 108.00			
				176th St..... 100.00			
					208.00	398	99
Southeast corner 176th St. and Park Ave. east.	9	2908	15	Mrs. S. M. Purdy.			
		*1152	*21	176th St..... 98.00			
				Park Ave. E..... 108.00			
					206.00	397	79
	10	"	8	J. Langbein.....	158.00	539	82
			*11				
	11	"	5	Mary A. Payne.....	58.00	198	16
			*7				
					5,304.14	$14,720	71

[* Figures erased in copy.]

54 Charged collector of assessments and arrears $26,167.14.
Department of finance, New York, February 25, 1899.

J. S. BARRETT,
Gen. Book-keeper.

NEW YORK, *January* 31, 1899.

Edward McCue, John Meyenborg, Thomas H. Wilson, board of assessors:

Entered in the bureau for collection of assessments and arrears February 17, 1899.

EDWARD GILON,
Collector of Assessments & Arrears.

February 17, 1899.

Confirmed by the board of revision of assessments, Feb. 17, 1899.

EDGAR J. LEVEY,
Chief Clerk.

55 EXHIBIT 15.

Objection of Petitioners to the First Assessment Proceeding.

Before the board of assessors.

In the Matter of the Assessment for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks on Vanderbilt Avenue East from Ward Line to 177th Street. No. 5665.

To the board of assessors.

GENTLEMEN: The New York & Harlem Railroad Company, as owner, and the New York Central & Hudson River Railroad Company, as lessee, of the following property: block No. 1219, lot No. 90; block No. 1219, lot No. 84; block No. 1208; lot No. 6; block No. 1180½, lot No. 1; block No. 1146½, lot No. 1; upon which an assessment has been laid of $4,687.82 for the above-entitled improvement, object and protest against the said assessment upon the following grounds: That it is unfair, unequal, inequitable and unjust, and is assessed more than the surrounding property.

The property assessed extends along the entire western line of the improvement for 4,105 feet, and is 66 feet wide. Upon the opposite or westerly side of the property assessed, which is held by the New York & Harlem Railroad Company, as owner, and is in the
56 possession of and is used and occupied by the New York Central & Hudson River Railroad Company, as lessee, for the purpose of its incorporation, is Vanderbilt avenue west, a public street and thoroughfare, and the property, therefore, is liable to an assessment for improvement for Vanderbilt avenue west. It is, therefore, not to be considered as full-lot property, although the assessment against it is made upon that basis.

By virtue of the above premises it is respectfully submitted that the foregoing assessment should be materially reduced.

Offered by petitioners.

NEW YORK & HARLEM RAILROAD COMPANY,
By E. V. W. ROSSITER, *Treasurer.*
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, *Treasurer.*

STATE OF NEW YORK, }
County of New York, } ss:

E. V. W. Rossiter, being duly sworn, says: That he it treasurer of the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company, and that the foregoing objections and the facts therein stated are true, as he verily believes.

——.

Sworn to before me this 15th day of December, 1898.

H. B. DWYER,
Notary Public, N. Y. Co.

Offered by petitioners.

57 EXHIBIT 16.

Objection of Petitioners to the Second Assessment Proceeding.

Before the board of assessors.

In the Matter of Paving, etc., with Granite Block Pavement, Park Avenue from the 23rd Ward Line to 177th Street (Vanderbilt Avenue East). No. 5688.

To the board of assessors.

GENTLEMEN: The New York & Harlem Railroad Company, as owner, and the New York Central & Hudson River Railroad Company, as lessee, of the following property: block No. 1219, lot- Nos. 90 and 84; block No. 1208, lot No. 6; block No. 1146½, lot No. 1; and block No. 1219, lot No. 1, upon which an assessment has been made for the above-entitled improvement, object and protest against the said assessment upon the same grounds set forth in the objections filed by the same parties herein in proceedings Nos. 5655 and 5681 by virtue of the premises set forth in the objections filed in the aforesaid proceedings; and it is respectfully submitted
58 that the foregoing assessments should be entirely vacated or materially reduced.

IRA A. PLACE,
Attorney for the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company.

Office and P. O. address, Grand Central station, New York city.

ROBERT L. LUCE, *Of Counsel.*

Offered by petitioners.

EXHIBIT 17.

Communication from the Board of Assessors Transmitting to the Board of Revision and Assessments the Second Assessment-list.

Office board of assessors.

NEW YORK, *Feb.* 3, 1899.

To the board of revision of assessments.

GENTLEMEN: The following assessment-list, to wit, borough of the Bronx,

Paving with granite block pavement the carriageway of and laying cross-walks in Park avenue from the 23rd ward line to 177th street, No. 5688

also copy of same, is herewith presented by order of the board of assessors, the same having been advertised for objections the 59 time prescribed by law, and the accompanying objections of the following-named owners:

New York & Harlem Railroad Company,
by Ira A. Place, attorney,

being still made to said assessment.

Yours respectfully, WM. H. JASPER, *Secretary.*

Offered by petitioners.

EXHIBIT 18.

Communication from the Board of Assessors Transmitting to the Board of Revision and Assessments the First Assessment-list.

Office board of assessors.

NEW YORK, *Jan.* 24, 1899.

To the board of revision of assessments.

GENTLEMEN: The following assessment-lists, to wit, borough of the Bronx,

Regulating, grading, curbing, flagging and laying cross-walks in Vanderbilt avenue east from the ward line to 177th street, together with a list of awards for damages caused by a change of grade, No. 5665

also copy of same are herewith presented by order of the board of assessors, the same having been advertised for objections the 60 time prescribed by law, and the accompanying objections of the following-named property-owners.

New York & Harlem Railroad Company,
by Robert L. Luce, attorney;
Jacob F. Paulsen, and authorized by Gumbleton & Hottenroth, attorneys,

being still made to said assessments.

Yours respectfully, WILLIAM H. JASPER, *Secretary.*

Offered by petitioners.

EXHIBIT 19.

Profile map of retaining wall of the easterly side of the New York & Harlem railroad sustaining Vanderbilt avenue east along the entire line of these assessments. Map entitled *In re* paving Vanderbilt avenue, east, petition of the New York Central & Hudson River Railroad Company, and another profile of the retaining wall along the easterly side of the New York & Harlem railroad sustaining Vanderbilt avenue east, between 170th street and Tremont avenue, taken from the map annexed to the agreement of the department of parks, dated September 5, 1887, and showing the measured heights at intersecting streets. Offered by petitioners.

(Here follows map marked p. 60*a*.)

61 CITY AND COUNTY OF NEW YORK, *ss*:

Robert L. Luce, being duly sworn, deposes and says: That he is an attorney and counsellor at law, and is connected with the law department of The New York Central and Hudson River Railroad Company, one of the petitioners in the foregoing proceeding, and that he has charge of the said proceeding; that no opinion was written upon the decision of the application of the said petitioners herein.

ROBERT L. LUCE.

Subscribed and sworn to before me this 16th day of October, 1899.

STANSBURY HAGAR,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

62 Pursuant to section 3301 of the Code of Civil Procedure we hereby stipulate that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the court below acted in making said order on appeal in the office of the clerk of the county of New York.

Dated New York, Oct. 25, 1899.

IRA A. PLACE,
Attorney for Petitioners and Appellants.
JOHN WHALEN,
Counsel to the Corporation of the City of New York, Respondent.

It is hereby stipulated that any or all of the exhibits not hereinbefore printed in full in these printed papers on appeal may be read by either party upon any argument of the said appeal.

Dated New York, October 20th, 1899.

IRA A. PLACE,
Attorney for Petitioners and Appellants.
JOHN WHALEN,
Counsel to the Corporation of the City of New York, Respondent.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

63 At a term of the appellate division of the supreme court, in and for the first department, held at the court-house thereof, in the county of New York, on the 9th day of March, 1900.

Present: Hon. Charles H. Van Brunt, P. J.; Hon. George C. Barrett, Hon. William Rumsey, Hon. Chester B. McLaughlin, JJ.

Order of Appellate Division Affirming Order of Special Term.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17th, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East from the Division Line between the Twenty-third and Twenty-fourth Wards to 177th Street, Confirmed February 17th, 1899.

64 The above-named petitioners, The New York Central and Hudson River Railroad Company, as lessee, and The New York and Harlem Railroad Company, as owner, having appealed to the appellate division of the supreme court in and for the first department, from the order herein entered and filed in the office of the clerk of the county of New York, on the 21st day of July, 1899, denying the petitioners' motion or prayer for the vacation or reduction of the assessments above mentioned, and the said appeal having come duly on to be heard,

Now, after hearing Ira A. Place, Esq., of counsel for petitioners, in support of said appeal, and George L. Sterling, Esq., assistant corporation counsel, in opposition thereto, upon motion of John Whalen, corporation counsel, it is unanimously

Ordered, that the said order, so appealed from as aforesaid, be and the same hereby is affirmed, with ten dollars costs and disbursements, to the city of New York.

65 Supreme Court, Appellate Division, First Department, February, 1900.

Chas. H. Van Brunt, P. J., George C. Barrett, William Rumsey, Chester B. McLaughlin, JJ.

Opinion, McLaughlin, J.

In the Matter of the Petition of THE N. Y. C. & H. R. R. R. Co. and THE N. Y. & H. R. R. Co. No. 1987.

MARCH 9, 1900.

Appeal from an order denying an application to vacate an assessment for local improvements.

Mr. Ira A. Place, for the appellants.
Mr. George L. Sterling, for the respondents.

MCLAUGHLIN, *J.:*

The New York Central & Hudson River Railroad Company and The New York & Harlem Railroad Company, upon a verified petition, applied to the special term of this court to have vacated two assessments upon their property for local improvements; one amounting to $4,687.82, for regulating and grading, and the other, amounting to $12,627.72, for paving Vanderbilt avenue, east, in the city of New York. These improvements were made under a reso-
66 lution of the common council, and the entire cost of the same was to be assessed "among the owners or occupants of all the houses and lots intended to be benefitted thereby, in proportion, as nearly as may be, to the advantages which each shall be deemed to acquire." (Chap. 410, Laws of 1882, sec. 878.)

The petitioners contended, in the court below, as they did upon this appeal, that their property upon which the assessments were levied is held and used solely for railroad purposes; that there are no buildings or improvements upon it, except railroad structures; and that it is not, and will not be benefitted by the improvements, and therefore, the assessments are illegal. The conclusion at which we have arrived, renders it unnecessary to determine whether the petitioners' property is, or will be, in fact benefitted by the improvements, for if that fact be conceded, it does not in and of itself entitle them to have the assessments vacated.

It is conceded by both parties that the application to have the assessments vacated is governed by certain provisions of the Greater New York charter. (Chapter 378, Laws of 1897.) The appellants contend that sec. 959 of the charter is applicable, and that under its provisions the petitioners have the right to apply to have the assessment- vacated, and that the court, if the assessments are illegal, has power to vacate and set them aside. This section, or so much of it as is applicable to the question, reads as follows: "If in the proceeding relative to any assessment or assessments for local improvements, or in the proceedings to collect the same, any fraud or sub-

stantial error shall be alleged to have been committed, the party aggrieved thereby may apply to a justice of the supreme court in special term, or in vacation, who shall thereupon, upon due notice to the corporation counsel, proceed forthwith to hear the proofs and
67 allegation- of the parties. If, upon such hearing, it shall appear that the alleged fraud or substantial error, other than such errors as are specified in the next section, has been committed as provided in this title, the said assessment shall be vacated or modified and the lien created thereby, or by any subsequent proceedings shall cease. If upon such hearing, it shall appear that by reason of any alleged irregularity the expense of any local improvements has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party be modified by deducting therefrom such sum as is in the same proportion to such assessment as is the whole of such unlawful increase to the whole amount of the expense of such local improvement."

It is not claimed that the assessments should be set aside on the ground of fraud, but it is insisted that "substantial error" was committed; that, the improvements being of no benefit whatever to the petitioners' property, there was no basis for the assessments, and no authority under the statute to impose the same. On the other hand, the respondent contends that, under sec. 962 of the charter, the court has no power to vacate an assessment for local improvements. Sec. 962 reads as follows:—"No court shall vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property for any local improvement otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents, by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value or fair cost of any local improvement, with interest at the rate of three per centum per annum from the date of con-
68 firmation to the final order of reduction, and seven per centum thereafter, be disturbed for any cause. The provisions of this section shall apply to actions to recover money paid for assessments and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement." These two sections of the charter are somewhat inconsistent, and in some respects, repugnant to each other; but, in order to ascertain the legislative intent, they must be read and construed together, and when this is done, it seems to us clear that the purpose of the two sections, and the object sought to be accomplished by them, was to deprive the court of the power "in any event" to vacate an assessment for local improvements. To hold otherwise, the plain meaning of sec. 962 must be disregarded, and the following words eliminated therefrom: "No court shall vacate * * * any assessment in fact or apparent, whether void or voidable, on any property for any local improvement"

The court is given the power to reduce an assessment, but deprived of the right to vacate it. It may correct an error, but it cannot entirely wipe out the assessment itself. In so far, therefore, as the two

sections are repugnant to, or inconsistent with, each other, effect must be given to the latter, in preference to the former. Applying a well-recognized rule, applicable to the construction of statutes, that "if the latter part of a statute be repugnant to the former part thereof, it shall stand and so far as it is repugnant, be a repeal of *the former part, because it was last agreed to* by the makers of the statute." (Harrington *vs.* Trustees of Rochester, 10 Wendell, 547, quoting Bacon's Abridgment, Sedgwick on Statutory Limitations, page 105.) This rule, it is true, is to be resorted to only in extreme cases and applied, when resorted to, with great caution. But
69 the language of section 962 is so clear and specific that what the legislature intended to accomplish cannot be seriously questioned, and to give effect to that intent this rule must be applied, so far as is necessary, to effectively carry out the intent. This section is substantially like—in fact, so far as this question is concerned, is the same as section 903 of the consolidation act prior to the amendment of 1895 (chap. 613). Section 903 of the consolidation act was a re-enactment of section 12 of chap. 550 of the Laws of 1880, which was construed by the court of appeals in the matter of Smith, 99 N. Y., 424. The matter of Smith was an application to have vacated an assessment for local improvements, and it was there conceded that the assessment in question was in fact illegal, but the court held that it had no power to vacate. The language of Judge Finch, in delivering the opinion of the court in that case, is quite applicable to the question here presented. He said: "The petitioner *in* pursuing his remedy under the provisions of the act of 1858, chap. 338, and its amendments. That is a special remedy. * * * It was a remedy which the legislature might give or refuse, and having given, might modify or limit at its pleasure. Originally very broad and covering a large class of cases, it was, at a later period, very much narrowed and restricted (Laws of 1880, chap. 550, paragraph 12). That restriction took the form of a positive prohibition. It forbade any interference with assessments through the operation of the special remedy as to all such confirmed after June 9th, 1880, for any improvements completed after the date of the enactment, and whether such assessments were 'in fact or apparent void or voidable,' except that they might be reduced to the fair value of the actual improvement made. * * * The amendment does not validate an
70 illegal assessment, but it does narrow a special remedy so that it no longer covers that particular wrong, and remits the injured party to the ordinary remedies of the citizen generally, except that a bill in equity to vacate the assessment or to remove it as a cloud on title is forbidden (Laws of 1882, chap. 410, paragraph 897). The property-owner may still challenge the validity of the assessment, whenever his property is seized under it, or it is made the foundation of proceedings against him. It is again urged that the amendment was intended to reach, and must be construed to cover, only cases of irregularity or fraud in which an original authority to make the assessment existed, and not to those in which there was no such authority. The language of the section does not permit such a construction. When it describes the assessment to which it

applies, not only as existing 'in fact' but as 'merely apparent,' and not only as 'voidable' but as 'void,' it carefully shuts the door upon any such limited construction, and lest the meaning should even then be doubtful, it adds that 'in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause.' * * * The courts below were, therefore, right in determining that the special remedy in vogue by the petitioner, had no application to the case which he presented." (See also Matter of Brainerd, 51 Hun, 380; aff'd 117 N. Y., 623; Matter of Feust, 121 N. Y., 299; Matter of Cullen, 53 Hun, 534.)

We are of the opinion that the application was properly denied, and that the order appealed from is right and must be affirmed, with $10 costs and disbursements.

All concur.

71 *Notice of Appeal to the Court of Appeals.*

Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Crosswalks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the Twenty-third and Twenty-fourth Wards to 177th Street, Confirmed February 17, 1899.

SIRS: Take notice that the above-named The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, and each of them, hereby appeal to the court of appeals from the order of the appellate division, first judicial department, entered and filed in the office of the clerk of the appellate division of the supreme court for the first judicial
72 department on the 19th day of March, 1900, and a certified copy of which order was filed in the office of the clerk of the county of New York on the 20th day of March, 1900, ordering that the order herein entered and filed in the office of the clerk of the county of New York on the 21st day of July, 1899, denying the motion or prayer of the petitioners, The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, for the vacation or reduction of the assessments above mentioned, be affirmed with ten dollars costs and disbursements to the city of New York, and from each and every part of said order.

Dated borough of Manhattan, New York city, March 27, 1900.

Yours, etc.,

IRA A. PLACE,

Attorney for The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, Petitioners and Appellants, Grand Central Station, Borough of Manhattan, N. Y. City, N. Y.

To William Sohmer, Esq., county clerk, New York county, county court-house, borough of Manhattan, N. Y. city, N. Y.; and John Whalen, Esq., corporation counsel, No. 2 Tryon row, borough of Manhattan, N. Y. city, N. Y.

73 Pursuant to section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the court below acted in making said order, on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, May 14, 1900.

IRA A. PLACE,
Attorney for the Petitioners and Appellants.
JOHN WHALEN,
Counsel to The Corporation of the City of New York, Respondent.

It is hereby stipulated that any or all of the exhibits not hereinbefore printed in full in these printed papers on appeal may be read by either party upon any argument of the said appeal.

Dated New York, May 14, 1900.

IRA A. PLACE,
Attorney for the Petitioners and Appellants.
JOHN WHALEN,
Counsel to The Corporation of the City of New York, Respondent.

74 At a special term, part II, of the supreme court, in and for the county of New York, held at the county court-house in said county on the 29th day of June, 1900.

Present: Hon. Frederick Smyth, justice.

In the Matter of the Petition of THE NEW YORK CENTRAL & HUDSON R. R. R. COMPANY, as Lessee; THE NEW YORK & HARLEM R. R. COMPANY, as Owner, Petitioners, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

The above-named petitioners The New York Central & Hudson R. R. R. Co. and The New York & Harlem R. R. Co., and each of them having appealed to the court of appeals from the order of the appellate division of the first judicial department, entered and filed in the office of the clerk of the appellate division of the supreme court for the first judicial department, on the 19th day of March, 1900, and a certified copy of which order was filed in the office of the clerk of the county of New York on the 20th day of March,

1900, ordering that the order herein entered and filed in the
75 office of the clerk of the county of New York, on the 21st day of July, 1899, denying the motion or prayer of the petitioners The New York Central & Hudson R. R. R. Co., and The New York & Harlem R. R. Co., for the vacation or reduction of the assessments above mentioned be affirmed with $10 costs and disbursements to the city of New York, and the said appeal having been duly argued before the court of appeals, and after due deliberation the court of appeals having ordered and adjudged that the said order so appealed from as aforesaid be and the same hereby is affirmed with costs, and after further ordering and adjudging that the proceeding therein be remitted to the supreme court there to be proceeded upon according to law, now on reading and filing the said remittitur and on motion of John Whalen, corporation counsel, it is,

Ordered that the said order and judgment of the court of appeals be and the same are hereby made the order and judgment of this court.

Enter,

F. SMYTH, *J. S. C.*

76 [Endorsed:] New York supreme court county of New York. The N. Y. Central & Hudson R. R. R. Co., and another, to vacate assessments, etc. Order on remittitur and notice of entry. John Whalen, corporation counsel, # 2 Tyron row, borough of Manhattan, New York city.

77 *Judgment.*

Supreme Court, County of New York.

In the Matter of the Petition of THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK & HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) *and* Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

The above-named petitioners The New York Central & Hudson River Railroad Company, as lessee, and The New York & Harlem Railroad Company, as owner, having appealed to the appellate division of the supreme court, in and for the first department, from the order herein entered and filed in the office of the clerk of the county of New York on the 21st day of July, 1899, denying the petitioners' motion or prayer for the vacation or reduction of the assessment above mentioned, and the said appeal having been duly argued at said appellate division and an order having been duly entered in the office of the clerk of the said appellate division on the 19th day of March, 1900, affirming the order so appealed from as aforesaid with $10 costs and disbursements to the city of

New York, and the cost of the city of New York having been duly taxed at the sum of $34.85, now upon motion of John Whalen, corporation counsel, it is

Adjudged that the said order so appealed from as aforesaid
78 be and the same hereby is affirmed, and it is further

Adjudged that the City of New York recover of the above-named petitioners The New York Central & Hudson River Railroad Company as lessee, and The New York & Harlem Railroad Company as owner, the sum of thirty-four and $\frac{85}{100}$ ($34.85) dollars the amount of its costs as taxed, and that it have execution therefor.

Dated New York, October 18 1900.

WM. SOHMER, *Clerk.*

79 [Endorsed:] New York supreme court county of New York. *In re* N. Y. Central & H. R. R. Co. as lesses, and the N. Y. & Harlem R. Co. as owner, to vacate assessments, etc. for regulating etc. Vanderbilt avenue, east, etc., and for paving Park avenue, etc. Copy of judgment and notice of entry. John Whalen, corporation counsel, # 2, Tyron row, borough of Manhattan, New York city.

80 *Judgment.*

Supreme Court, County of New York.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Lessees, and THE NEW YORK AND HARLEM RAILROAD COMPANY, Owners, Petitioners, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Dividing Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

The above-named petitioners, The New York Central and Hudson River Railroad Company, as lessees, and The New York and Harlem Railroad Company, as owners, and each of them have appealed to the court of appeals from the order of the appellate division of the first judicial department, entered and filed in the office of the clerk of the appellate division of the first judicial department on the 19th day of March, 1900, and a certified copy of which was filed in the office of the clerk of the county of New York on the 20th day of March, 1900, ordering that the order herein, entered and filed in the office of the clerk of the county of New York on the 21st day of July, 1899, denying the motion or hearing of the petitioners, The New York Central and Hudson River Railroad Company, as lessees, and The New York and Harlem Railroad Company, as owners, for

the vacation or reduction of the assessment above mentioned
81 be affirmed with ten dollars costs and disbursements to the city of New York, and the said appeal having been duly argued before the court of appeals, and the court of appeals having ordered

and adjudged that the said order so appealed from as aforesaid be affirmed with costs, and an order having been duly entered in the office of the clerk of this court on the 29th day of June, 1900, making the order and judgment of the court of appeals the order and judgment of this court, and the costs of the city of New York having been duly taxed at the sum of $119.02; now, upon motion of John Whalen, corporation counsel, it is

Adjudged that the order so appealed from as aforesaid be and the same hereby is affirmed; and it is

Further adjudged that the City of New York recover of the above-named petitioners, The New York Central and Hudson River Railroad Company, as lessees, and The New York and Harlem Railroad Company, as owners, the sum of $119.02 the amount of its costs and disbursements, and that it have execution therefor.

Dated, New York, October 18, 1900.

WM. SOHMER, *Clerk.*

82 [Endorsed:] New York supreme court. County of New York. In the matter of the petition of The N. Y. Central & Hudson R. R. R. Co., *et al.*, petitioners, to vacate assessments (1) for reg., etc., Vanderbilt Ave. east, from the ward line to 177th street, etc. Copy of judgment and notice of entry. John Whalen, corporation counsel, No. 2 Tyron row, borough of Manhattan, New York city.

83 STATE OF NEW YORK, *County of New York,* } ss:

I, William Sohmer, clerk of said county and also clerk of the supreme court, a court of record held therein, do hereby certify that I have compared the annexed copy of remittitur, issued by and from the court of appeals, and of the respective papers whereon the said appeal was heard and determined as in and by the said remittitur set forth, filed in this office on the 29th day of June, 1900, the order of this court pursuant to the said remittitur, entered of date June 29, 1900, and the judgments in pursuance of said order, entered of date October 29, 1900, respectively, and that the same is a correct transcript from and of the whole of said originals.

In testimony whereof I have hereunto set my hand and affixed my official seal this 11th day of December, 1900.

[Seal New York.]

WM. SOHMER, *Clerk.*

M. J. D.

{ Ten-cent United States internal-revenue stamp, canceled Dec. 11, 1900. W. S. }

84 [Endorsed:] Clerk's certificate to remittitur, etc.

85 Supreme Court, Appellate Division, First Judicial Department.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

I, Charles H. Van Brunt, presiding justice of the appellate division of the supreme court of the State of New York, first judicial department, do hereby certify that I was such presiding justice of said court at and upon the hearing, determination and decision in and by said court of the above-entitled cause, upon and concerning which the opinion was announced by Mr. Justice McLaughlin on March 9, 1900, as appears in and by the said case as appealed to the court of appeals. I do further certify that the printed brief presented and submitted by counsel for and on behalf of the said respective railroad companies, petitioners and appellants, at and upon the said hearing of said cause in and by the said supreme court, ap-
86 pellate division, contained, among others, the following matters, to wit:

"The claim of the city is not only that we are deprived of certain particular remedies, but that the result of the legislation is to deprive us of every affirmative remedy which we might otherwise have had. This cannot be.

A law which deprives a party of all legal remedy must necessarily be void. Cooley's Constitutional Limitations (6th ed.), 350, 442 and 443; Lennon *vs.* Mayor, 55 N. Y., 361; Taylor *vs.* Porter, 4 Hill, 144.

In Jex *vs.* Mayor, 103 N. Y., 536, where the act as amended by chapter 312 of the Laws of of 1874, was under discussion, it is said, on page 540:

'The act of 1874 did not in terms, and could not have been intended to take away all remedy to recover back money wrongfully extorted under color of an illegal assessment.'

And on page 541, discussing the question as to whether it was necessary that the assessment should have been vacated before the money could be recovered back, it is said:

'If, however, the vacation of the assessment was necessary, that relief may be had in this action, in connection with relief for the recovery of the money which the plaintiff's testator was illegally compelled to pay.'

This was a plain intimation that notwithstanding the prohibition in the act of 1874, the assessment could have been vacated in an action at law.

The corporation counsel asserts that the petitioners are not deprived of all remedy, because they still would have a right to resist

either an action on the part of the city to recover the amount of the assessment, or to resist the entry of any purchaser under a sale by the city for the amount of the assessment. These, however, are defenses. The city may take such time as it sees fit to pursue either of these courses, and in the meantime the petitioners must sit by and incur the risk of the large interest, penalties and forfeitures which may result under the provisions of the statute. In the case of a private owner he may be prevented from making a sale of his property, or of obtaining a loan upon it and thereby putting it to such use as he may desire. In the case of the petitioner, The New York Central and Hudson River Railroad Company, it must take the risk of a forfeiture of its lease (fol. 122) which provides that—

'It will pay the taxes, charges and assessments, ordinary and extraordinary, that may be imposed or assessed in any way on said railroad, branch, or property, or any part thereof, or upon or against the said party of the first part by reason thereof' (page 5 of the lease).

87 This they cannot be compelled to do; this, the law does not compel them to do; and it is insisted that the statutes under consideration do not and were not intended to leave property-owners in this helpless condition.

* * * * * * *

Point three.

If, by prohibiting judicial review, the result of section 962 is to enable the assessors to assess property for local improvements without reference to the benefits conferred upon the property by such improvements, that section is unconstitutional.

We have, heretofore, shown that a statute which authorizes assessments for local improvements other than in accordance with the benefits conferred, is unconstitutional and void.

Norwood *v.* Baker, 172 U. S., 269.

It cannot possibly make any difference whether the vice is in the statutory direction as to the method to be pursued by the assessors in making the assessment, or whether the statutory direction being correct, the same result is reached by other provisions of the statute. It is conceded that the statutory direction, both in the consolidation act (sec. 878) and in the Greater New York charter (sec. 946), is lawful. They both direct that the property shall be assessed in accordance with the benefit conferred by the improvement. Section 962 is a part of the same statute. If by reason of its provisions the assessors are enabled to do, indirectly what they are not directly authorized to do, that is, to assess property irrespective of the benefits conferred, the result is the same and the statute must fall."

Witness my hand officially this 3rd day of December, 1900.

CHARLES H. VAN BRUNT,
Presiding Justice.

88 STATE OF NEW YORK, }
County of New York, } ss.:

I, Alfred Wagstaff, clerk of the said appellate division of the supreme court, being a court of record held in the said county, do hereby certify that the Honorable Charles H. Van Brunt was on the day of the date last mentioned in the above and foregoing certificate the presiding justice of the appellate division of the supreme court of the State of New York, first judicial department, and that the signature thereto is his genuine signature.

In testimony whereof I have hereunto set my hand and official seal the 3d day of December, 1900.

[SEAL.] ALFRED WAGSTAFF, *Clerk.*

Due service of the above and foregoing certificate admitted this 16th day of January, 1901.

JOHN WHALEN,
Corporation Counsel, Attorney for The City of New York, Defendant in Error.

89 [Endorsed:] Supreme court, appellate division, first judicial department. In the matter of the petition of The N. Y. C. & H. R. R. R. Co., as lessee, and The N. Y. & Harlem R. R. Co., as owner, to vacate assessments: 1. For regulating and grading setting curbstones, etc. in Vanderbilt Ave. east, from ward line to 177th St., confirmed Feb. 17, 1899; 2. For paving Park Ave., otherwise Vanderbilt Ave. east, from the division line bet. the 23d and 24th wards to 177th St., confirmed Feb. 17, 1889. Certificate by the presiding justice in respect to certain portions of petitioners' brief.

90 In the Court of Appeals.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Crosswalks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

I, Alton B. Parker, chief judge of the court of appeals of the State of New York, and having presided as such at and upon the hearing, determination and decision of the above-entitled cause in and by the said court, do hereby certify that in and of the printed brief and argument presented and submitted by counsel for and on behalf of the said petitioners and appellants, The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, at and upon the said hearing were, among others, the following matters, to wit:

"The claim of the city is not only that we are deprived of certain particular remedies, but that the result of the legislation is to deprive us of every affirmative remedy which we might otherwise have had. This cannot be.

A law which deprives a party of all legal remedy must necessarily be void. Cooley's Constitutional Limitations (6th ed.), 350, 442 and 443; Lennon *vs.* Mayor, 55 N. Y., 361; Taylor *vs.* Porter, 4 Hill, 144.

91 In Jex *vs.* Mayor, 103 N. Y., 536, where the act as amended by chapter 312 of the Laws of 1874 was under discussion, it is said, on page 540:

'The act of 1874 did not in terms, and could not have been intended to take away all remedy to recover back money wrongfully extorted under cover of an illegal assessment.'

The corporation counsel asserts that the appellants are not deprived of all remedy, because they still would have a right to resist either an action on the part of the city to recover the amount of the assessment, or to resist the entry of any purchaser under a sale by the city for the amount of the assessment. These, however, are defenses. The city may take such time as it sees fit to pursue either of these courses, and in the meantime the petitioners must sit by and incur the risk of the large interest, penalties and forfeitures which may result under the provisions of the statute. In the case of a private owner he may be prevented from making a sale of his property, or of obtaining a loan upon it and thereby putting it to such use as he may desire. In the case of the petitioner, The New York Central and Hudson River Railroad Company, it must take the risk of a forfeiture of its lease (fol. 122), which provides that

'It will pay the taxes, charges and assessments, ordinary and extraordinary, that may be imposed or assessed in any way on said railroad, branch, or property, or any part thereof, or upon or against the said party of the first part by reason thereof' (page 5 of the lease).

This they cannot be compelled to do; this, the law does not compel them to do; and it is insisted that the statutes under consideration do not and were not intended to leave property-owners in this helpless condition.

The interpretation of the successive statutory provisions prescribing and regulating the remedy afforded to a property-owner believing himself aggrieved by assessment, must be undertaken in the light of the peculiar subject-matter to which the various provisions have relation. Regard is also to be had to the distinction between what the legislature may and what it may not do or authorize the doing of. The feature which distinguishes local assessments from general taxation is that by the former the tax-payer is deemed to have received compensation for the general tax exacted from him in and through the general benefits resulting to him in common with other members of the community from the maintenance of government by the body politic, but for the latter he is deemed to receive compensation through and by means of special benefit resulting to his property by means of the local improvement, to the extent to

92 which contribution is exacted from him in the form of a special assessment. The fundamental principle uniformly recognized in the enforcement of such assessment is that its imposition must not have been any greater measure than the manifest special benefits accruing to his property by means of the improvement. The detail of procedure by which the measure of benefit and assessment respectively are to be in the first instance ascertained and declared, it is incumbent upon the legislature to provide for by the legislative enactment. These matters of administrative detail the legislature may well find it desirable to change from time to time as experience may suggest, but the underlying principle upon which the assessment must stand and be supported, if it can be supported at all, is not subject to legislative control. As is tersely stated by Judge Cooley in his great work on Constitutional Limitations, 'administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.' Cooley's Constitutional Limitations (6th ed.), page 434.

Legislative enactment is to be interpreted and construed upon the hypothesis that the legislature has in its enactments had due regard for these limitations upon its power, and that interpretation to be given to the language promulgated by it which will render it conformable to, rather than violative of, the rule of State and Federal constitution.

* * * * * * *

The case of the Elm Street Widening, New York Law Journal of February 8, 1895, page 1163, was quoted from and relied upon in the brief of counsel for the city in the court below, wherein he speaks of it as 'a case much more extreme than the present one.' He leaves to conjecture as to in what respect he so regards it. It was more extreme only in that it expressed more clearly the legislative intent to substitute a more summary and expeditious remedy than that theretofore existing. The statutes there under consideration were sections 952 to 1008 of the consolidation act, as amended by chapter 660 of the Laws of 1893, and related particularly to the amendments of that year. The objection made to the enactment was that by the retention of the old provisions with the new ones the enactment was so defective and contradictory in its provisions that a land-owner would not be assured of a prompt and complete remedy, and that, therefore, the provision for the taking of private property thereunder was unconstitutional. The rule giving effect to the later provision was thus resorted to by the court in favor of the support and enlargement of the remedy, so that its application as well as its weight and effect were the opposite of what the counsel of the municipality is here contending for. Indeed, in so far as the Elm Street Widening case is authority at all here, it is against the proposition for which the city's counsel relies upon it for his contention here, in that, while sustaining the constitutionality of the act for the purpose of the taking of private property

by the city, it recognizes the principle that the city's
93 taking of property would not be sanctioned by the court if the court found that the legislation did not preserve to the property-owner such plain and adequate remedy as the guarantees of the Constitution fairly entitle him to. Here the contention of the city's counsel is for such interpretation of the enactment in question as shall sustain the taking of private property and deny to the owner in all matter of substance the protection of his property rights which the constitutional provisions were designed to afford. The citation is, to say the least of it, an inopportune one for the purpose for which it was relied upon.

Point three.

If, by prohibiting judicial review, the result of section 962 is to enable the assessors to assess property for local improvements without reference to the benefits conferred upon the property by such improvements, that section is unconstitutional.

A statute which authorizes assessments for local improvements, other than in accordance with the benefits conferred, is unconstitutional and void.

Norwood *vs.* Baker, 172 U. S., 269.

That case holds that the only principle justifying the levying of assessments for local improvements is

'that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not in fact pay anything in excess of what they receive by reason of such improvements.'

* * * * * * *

It cannot possibly make any difference whether the vice is in the statutory direction as to the method to be pursued by the assessors in making the assessment, or whether the statutory direction, being correct, the same result is reached by other provisions of the statute. It is conceded that the statutory direction, both in the consolidation act (sec. 878) and in the Greater New York charter (sec. 946), is lawful. They both direct that the property shall be assessed in accordance with the benefit conferred by the improvement. Section 962 is a part of the same statute. If by reason of its provisions the assessors are enabled to do indirectly what they are not directly authorized to do, that is, to assess property irrespective of the benefits conferred, the result is the same and the statute must fall.

If, therefore, the court finds that it is obliged to so interpret and apply the provisions of the statutes referred to as to hold that the court is thereby precluded from affording relief, then and in
94 that case we submit that the statute as a whole upon this subject operates to impose a burden upon the property of complainant in the way of colorable assessment, without regard to special benefit, and thus operates to take the property of complainant without due process of law, and to deprive it of protection of the laws.

The statute makes the assessment a lien on the property assessed,

and requires that public notice of such lien be given by advertisement (charter, §§ 1017 and 1018); and it is to be borne in mind that there is practically no limitation upon the period of time that the municipality may delay enforcement and still retain its lien for, and right to enforce, payment of the assessment.

In the carrying of these statutory provisions into the charter of New York city there was added to the former provisions carried into section 962 this, to wit, 'the provisions of this section shall apply to actions to recover money paid for assessments, and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement.' This, evidently, was to meet the difficulty encountered by the city in the Poth case, 151 N. Y., 16. Thus, whatever rule this legislation itself provided, whether the strict one contended for by the able counsel on behalf of the corporation of the city of New York, or the more liberal one above contended for, whatever the rule is, it is applicable as well to actions seeking recovery back of assessments paid as to those seeking vacation of the assessments without payment.

The consequence is that if the remedy here sought is not available, the aggrieved party, although pleading and proving all that the statute seems to require, as hereinabove stated, must nevertheless be subjected to having his property covered by a colorable lien and charge for such indefinite time as the municipality may see fit to forego attempt to enforce payment. Manifestly if the infirmity in the assessment does not appear upon the face of the record, and evidence other than the record has to be resorted to for proof of that infirmity, the law thus interpreted holds out an inducement to the municipal authorities to defer proceedings to enforce payment of the assessment until, by lapse of time, the evidence of the infirmity shall be no longer available. During all this time that which gives value to the property, to wit: the right and power of a reasonably free and untrammeled disposal of it, is effectually and to every intent and purpose taken and kept from the owner. If it is among the powers of the municipality, through its board or tribunal, charged with assessments of property for the expense of local improvements, to impose a colorable though invalid charge and hold a colorable though invalid lien therefor, and postpone indefinitely the enforcement thereof, and during such delay the thereby aggrieved owner is without remedy to clear his property of such colorable burden, and his power of disposal of his property is in
95 such degree hampered as to constitute practical coercion of payment of the colorable though invalid charge against him. This is inevitably the operation of the law as contended for by counsel on behalf of the corporation of the city of New York.

If the language of the legislation is such as to afford the court no alternative, but to give it such interpretation and effect as this, the law is manifestly violative of complainant's property rights as if it operated to take the physical property itself and deprive complainant thereof without compensation.

The case of Wynehamer *vs.* The People, 13 N. Y., 378, presented among other questions, that of the constitutionality of the act 'to

prevent intemperance, pauperism and crime,' in that it interfered with the disposal of that class of property to which the act had reference.

Speaking upon this subject Comstock, J., says:

'Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature, property did not exist at all. "Every man might then take to his use what he pleased, and retain it if he had sufficient power, but when men entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof, proper laws were ordained." (Tomlyn's Law Dic., Property; 2 Bl. Comm. 34.) Material objects, therefore, are property, in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are fundamentally the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression, destroys the notion of property, although the things themselves may remain physically untouched.

Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Comm., 138), "The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." Chancellor Kent says (2 Comm., 320), "The exclusive right of using and transferring property, follows as a natural consequence from the perception and admission of the right itself." And again (p. 326), "The power of alienation of property is a necessary incident to the right, and was dictated by mutual convenience and mutual wants." By another author property is defined as an "exclusive right to
96 things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or giving them away to any other person without consideration, or even throwing them away." (Bouvier Law Dic. tit. Property.) These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made.'

The operation of the law is no less mischievous and no less within the inhibition of the Constitution merely because it accomplishes the effects above stated by indirection instead of in and by such direct language as that to which the court had reference in the case last above cited.

* * * * * * * *

If, therefore, section 962 of the charter deprives the owner of all remedy by means of which an assessment actually void upon his property may be vacated, it operates to deprive him of property, and

the effect is the same as if the statute directly authorized the making of a void assessment.

But if the effect of the statute is to take from the owner all remedy, it is invalid for another reason; for it is beyond the power of the legislature to deprive the owner of all remedies.

'It has been held that the legislature may even take away a common-law remedy altogether without substituting any in its place, if another and efficient remedy remains.'

Cooley on Constitutional Limitations, 6th edition, page 349.

'But a law which deprives a party of all legal remedy must necessarily be void.'

Id., page 350."

Witness my hand officially this 13th day of Nov., 1900.

(S'g'd) ALTON B. PARKER, *Ch. J.*

Court of Appeals, Clerk's Office.

ALBANY, *November 13th*, 1900.

97 I, William H. Shankland, clerk of the court of appeals of the State of New York, being a court of record held therein, do hereby certify that the Honorable Alton B. Parker was upon the day of the date of the above and foregoing certificate the chief judge of the said court and that the signature thereto is his genuine signature.

In testimony whereof I have hereunto sey my hand and official seal the 13th day of November, 1900.

[SEAL.] (S'g'd) W. H. SHANKLAND, *Clerk.*

Due service of the above and foregoing certificate admitted this 16th day of January, 1901.

JOHN WHALEN,
Corporation Counsel,
Attorney for The City of New York, Defendant in Error.

98 [Endorsed:] In the court of appeals. Matter of Vanderbilt avenue. Copy certificate of the chief judge, court of appeals.

99 STATE OF NEW YORK, }
Court of Appeals. }

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating, &c., Vanderbilt Avenue East; (2) for Paving Park Avenue.

"Order affirmed with costs, on opinion below. Parker, Ch. J., O'Brien, Bartlett, Vann & Cullen, JJ., concur. Haight & Landon, JJ., dissent. No opinion."

OFFICE OF THE STATE REPORTER, ALBANY, NEW YORK.

I, Edwin A. Bedell, "State reporter," of the State of New York, and as such the official reporter of the court of appeals of said State, and the custodian of the original memorandums of the decisions of said court, do hereby certify that as such reporter I have in my custody the original memorandum of the decision of the court of appeals in the above-entitled cause, rendered June 22, 1900, as delivered to me by the judges of said court; that I have carefully compared the above and foregoing with the said original memorandum, and do hereby certify that the above and foregoing is a full and true copy of the said original memorandum. I do further certify
100 that no other or further opinion was announced or rendered by the said court of appeals in said cause.

In witness whereof, I have hereunto set my hand officially this 29 day of September, A. D., 1900.

EDWIN A. BEDELL,
State Reporter.

STATE OF NEW YORK, }
Court of Appeals. }

CLERK'S OFFICE, ALBANY, NEW YORK.

I, William H. Shankland, clerk of the court of appeals of the State of New York, do hereby certify that Edwin A. Bedell, was on the twenty-second day of June, A. D., 1900, and from thence hitherto, and is "State reporter" of the State of New York, and as such the official reporter of the court of appeals of said State, and custodian of the memorandums of the decisions of said court. I do further certify that the above and foregoing purported signature of the said Edwin A. Bedell is his genuine signature, and that the said certificate of the said State reporter is entitled to full faith and credit.

In witness whereof, I have hereunto set my hand officially, and the seal of said court, this 29th day of September, A. D., 1900.

[SEAL.] W. H. SHANKLAND, *Clerk.*

101 [Endorsed:] State of New York, court of appeals. In the matter of the petition of the N. Y. C. & H. R. R. R. Co. as lessee, and the N. Y. & Harlem R. R. Co., as owner, to vacate assessments (1) for regulating, &c., Vanderbilt avenue east; (2) for paving Park avenue. Copy of memorandum of court of appeals. Ira A. Place, attorney for appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

102 Due service of copy of the foregoing certified excerpt from brief of counsel for railroad companies in supreme court, appellate division, certified excerpt from brief of counsel for railroad companies in the court of appeals, and certified memorandum of the court of appeals, is acknowledged this 16th day of January, 1901.

JOHN WHALEN,
Corporation Counsel, Attorney for The City of New York, Defendant in Error.

103 [Endorsed:] Clerk's certificate to briefs & court of appeals memorandum.

104 *Petition for Writ of Error to the Supreme Court of the State of New York.*

In the Supreme Court of the United States.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

To the honorable justices of the Supreme Court of the United States:

Come now the said petitioners, The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, and each of them, by their attorney, and complain that in the record and proceedings had in the above-entitled cause, and also in the rendition of the final order and judgment in the said cause, in the supreme court of the State of New York, sitting in New York county, first judicial department, at the March term thereof, A. D. 1900, to wit: March 9, 1900, wherein was drawn in question the validity of a statute of said State, and the validity of an authority exercised under said State, on the ground of their depriving petitioners of their property rights without due process of law, and thus being repugnant to the Constitution of the United States, and the decision of the said court was in favor of such their validity, as also in the final order and judgment of the court of appeals of the State of New York, to which last-mentioned court the said cause was appealed by said petitioners, being the highest court of law and equity in said
105 State, and the highest such court in which a decision could be had in the said cause, to wit, on June 22d, A. D. 1900, affirming on appeal the said final order and judgment of the said supreme court of the State of New York, in the said cause between the said The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, petitioners, and plaintiffs in error, and the said The City of New York, respondent, and defendant in error, and in which said court of appeals was in manner aforesaid drawn in question the validity of the same statute of said State, and the validity of the same authority, exercised under said State, as depriving said petitioners of their property rights without due process of law, and thus being repugnant to the Constitution of the United States, and the decision of the said court of appeals was in favor of such their validity, and that in and by and in pursuance of the said judgment of affirmance and

order of mandate and remittitur of the said court of appeals of the State of New York, the record and proceedings in said cause were remitted to and now remain in the said supreme court of the State of New York before the justices thereof; and in pursuance thereof and of the statutes of the State of New York in such case made and provided, thereafter, to wit, on June 29 and Oct. 18, respectively, A. D. 1900, final order and judgment was rendered by and entered in the said supreme court, in said cause, in obedience to and in conformity with the said decision, order, judgment and remittitur of the said court of appeals; in all whereof manifest error hath happened to the prejudice and damage of the said The New York Central and Hudson River Railroad Company and the said The New York and Harlem Railroad Company, respectively.

106 Wherefore, the said petitioners, plaintiffs in error, and each of them, pray for the allowance of a writ of error, and for such other and further orders and process as may cause the record and proceedings aforesaid, with all things concerning the same, to be sent to the Supreme Court of the United States, that upon final hearing hereof the said error be corrected, and such other and further proceedings be ordered and had as according to law should be done.

IRA A. PLACE,
Attorney for Petitioners, Plaintiffs in Error.

THOMAS EMERY, *Of Counsel.*

Office & post-office address, 417 Grand Central station, New York city.

Writ of error allowed, and the amount of bond for costs on said writ of error is hereby fixed at $500.00 this 3d day of January, 1901.

BROWN,
Justice of Supreme Court United States.

107 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before some of you, rendered in the said supreme court and affirmed by the judgment of the court of appeals of the State of New York, being the highest court of law or equity in the State of New York, and being the highest court of law or equity of the said State in which a decision could be had in the said suit, and wherein the record, judgment and proceedings having been by the order of the said court of appeals of the State of New York remanded and remitted to the said supreme court of the State of New York; as also in the further record, proceedings and judgment had and rendered in the said cause in the said supreme court of the State of New York in obedience to and in accordance with the said order and mandate of the said court of appeals, between The New York Central

and Hudson River Railroad Company and The New York and Harlem Railroad Company, petitioners, and plaintiffs in error, and The City of New York, respondent and defendant in error, wherein was drawn in question the validity of a statute of said State, and the validity of an authority exercised under said State, respectively, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said The New York Central and Hudson River Railroad Company and The
108 New York and Harlem Railroad Company, respectively, plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within 30 days from the date hereof next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, — Justice of the Supreme Court of the United States, the 3d day of January 1901.

JAMES H. McKENNEY,

[SEAL.] *Clerk of the Supreme Court of the United States.*

Allowed by—

HENRY B. BROWN,

Associate Justice of Supreme Court United States.

109 Due service of copy of petition and writ of error admitted this 16th day of January, 1901.

JOHN WHALEN,

Corporation Counsel, Attorney for The City of New York, Defendant in Error.

110 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of New York, New York, and John Whalen, corporation counsel, its attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the United States, wherein The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company are plaintiffs, and you, The City of New York, are defendant in error, to show cause, if any there be, why the order and judgment in said writ of error men-

tioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry B. Brown, — justice of the Supreme Court of the United States of America, this 3d day of January A. D., 1901.

H. B. BROWN,
Justice of Supreme Court United States.

111 I hereby accept due and personal service of this citation on behalf of the City of New York this 16th day of January 1901.

JOHN WHALEN,
Corporation Counsel, Attorney for The City of New York, Defendant in Error.

112 [Endorsed:] Supreme Court of United States. In the matter of the petition of the N. Y. C. & H. R. R. R. Co. as lessee, and the New York and Harlem R. R. Co., as owner, to vacate assessments (1) for regulating, etc., Vanderbilt avenue east; (2) for paving Park avenue Petition for writ of error, writ of error & citation. Ira A. Place, attorney for appellants Grand Central station, borough of Manhattan, N. Y. city, N. Y.

113 49462.

New York Supreme Court, County of New York.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and Another to Vacate Assessments.

Know all men by these presents that we, the New York Central and Hudson River Railroad Company and the New York and Harlem Railroad Company, as principals, and the National Surety Company, having an office and principal place of business at # 346 Broadway, borough of Manhattan, city of New York, as surety, are held and firmly bound unto the City of New York, in the sum of five hundred ($500) dollars to be paid to the said City of New York, to which payment well and truly to be made we bind ourselves and our successors and assigns, firmly by these presents.

Sealed with our seals and dated the 17th day of December, 1900.

Whereas, the above-named, The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, have sued out a writ of error to the Supreme Court of the United States, to reverse the judgment in the above-entitled cause by the supreme court of the State of New York, entered on the remittitur of the court of appeals of the State of New York, bearing date the 22nd day of June, 1900.

114 Now, therefore, the condition of the above obligation is such, that if the above-bounden The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, shall prosecute said writ to effect, and answer all costs and damages if they shall fail to make good their plea, then

this obligation to be void, otherwise to remain in full force and virtue.

Dated New York, December 17th, 1900.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

[SEAL.] By S. R. CALLAWAY, *President.*

Attest: E. D. WORCESTER, *Secretary.*

NEW YORK AND HARLEM RAILROAD COMPANY,

[SEAL.] By W. K. VANDERBILT, *President.*

Attest: E. V. ROSSITER, *Secretary.*

NATIONAL SURETY COMPANY,

[SEAL.] By ALEX. GREIG, *2nd Vice-President.*

Attest: WM. R. WORRALL, *Res. Ass't Secretary.*

Stamp.

115 49462.

STATE OF NEW YORK, *County of New York,* } *ss:*

On this 26th day of December, 1900, before me personally appeared S. R. Callaway president of the New York Central and Hudson River Railroad Company, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

LEIGH BEST,

[SEAL.] *Notary Public, New York County.*

STATE OF NEW YORK, *County of New York,* } *ss:*

On this 26 day of December, 1900, before me personally appeared W. K. Vanderbilt, president of the New York & Harlem Railroad Company, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

EDGAR FREEMAN,

[SEAL.] *Notary Public.*

116 49462.

COUNTY OF NEW YORK, *ss:*

On this 17th day of December, 1900, before me personally appeared Alex. Greig 2nd vice-president of the National Surety Com-

pany, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the county of New York; that he is the 2nd vice-president of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as 2nd vice-president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720 of New York Session Laws of 1893. And the said Alex. Greig further said that he is acquainted with Wm. R. Worrall and knows him to be the res. ass't secretary of said company; that the signature of the said Wm. R. Worrall subscribed to the said instrument is in the genuine handwriting of the said Wm. R. Worrall and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Alex. Greig 2nd vice-president.

[SEAL.]

J. T. WEMYSS,
Notary Public, 42, *N. Y. C.*

Copy of By-law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII, SEC. 1. Signatures required.—All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the president, the vice-president, the second vice-president, a resident vice-president, or an attorney-in-fact, and, except when signed by an attorney-in-fact, shall have the seal of the company affixed thereto, duly attested by the secretary, an assistant secretary or a resident assistant secretary. The vice-president, second vice-president and resident vice-presidents shall each have authority to sign such instruments whether the president be absent or incapacitated or not; and the assistant secretaries and resident assistant secretaries shall each have authority to seal and attest such instruments, whether the secretary be absent or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the company as if the same were signed by the president, duly sealed and attested by the secretary."

COUNTY OF NEW YORK, *ss:*

I, Wm. R. Worrall res. ass't secretary of the National Surety Company, have compared the foregoing by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company, at the county of New York, this 17th day of Dec. 1900.

[SEAL.] WM. R. WORRALL,
Res. Ass't Secretary.

117 The within bond approved.

BROWN, *Asso. Just.*

118 SIR: Please take notice that within is a copy of bond filed with the clerk of the supreme court of New York county this 17th day of January, 1901.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

Service of a copy of the within bond and notice admitted this 16th day of January, 1901.

JOHN WHALEN,
Corporation Counsel, Attorney for The City of New York, Defendant in Error.

119 *Assignment of Errors.*

In the Supreme Court of the United States.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

To the honorable justices of the Supreme Court of the United States:

Come now the said petitioners, plaintiffs in error, and file the following assignments of error upon which they and each of them will rely in and for their prosecution of the writ of error in the above-entitled cause.

That the said supreme court of the State of New York erred in rendering, and the said court of appeals of the State of New York erred in affirming the order and judgment wherein and whereby the provisions of sections 958, 959, 962 and 1017 of chapter 378 of the Laws of 1897 of the State of New York, and the authority exercised thereunder, were held valid, as not depriving plaintiffs of their property rights without due process of law, and hence not repugnant to the Constitution of the United States, and in pursuance whereof it was ordered and adjudged "that the motion or prayer of the petitioner be and the same hereby is denied with ten dollars costs to the city of New York."

That the said courts, respectively, erred in holding the said statu-

tory provisions valid as not depriving plaintiffs of their prop-
120 erty rights without due process of law and hence denying to the said petitioners the relief, order and decree prayed for by them in and by their petition in said cause, and in rendering judgment against them for costs and disbursements in and of the said cause.

That the said courts, respectively, erred in holding and deciding that by reason of and by virtue of the said statute of the State of New York, the said petitioners were, and each of them was, disentitled to have and maintain their said action, and to have the relief, order and decree, by them, respectively, in and by their said petition and suit prayed for.

That the said courts, respectively, erred in holding and deciding valid, as against the said petition and suit of said petitioners, and as not repugnant to the Constitution of the United States, the said authority exercised under the State of New York by means whereof the said liens were imposed, attached and subsisted against the property of the said petitioners, as complained of by the said petitioners in and by their petition in said cause.

That the said courts, respectively, erred in holding and deciding valid and not repugnant to the Constitution of the United States the said statute of the State of New York by the tenor whereof petitioners are denied relief against and concerning the assessments and the subsisting liens thereof, of which they complained in and by their petition in said cause.

That the said courts, respectively, erred in holding and deciding to be valid and not repugnant to the Constitution of the United States the said statute of the State of New York by the tenor whereof said petitioners were and are denied protection of their vested property rights against the liens of assessments laid
121 and levied against their property without regard to, and in the absence of any benefit resulting to said property from the local improvements for the cost of which the said assessments were imposed and levied.

That the said courts, respectively, erred in holding and deciding, as against the complaint and prayer of said petitioners, that the said authority in that behalf exercised under the State of New York whereby the said assessments were imposed and the liens thereof attached and subsisted, against the property of petitioners, was thus exercised under authority of law.

That the said courts, respectively, erred in holding and deciding that the said statute of the State of New York in that behalf constituted authority of law for the imposition, attaching and subsistence of the liens of the assessments in and by the petition of the said petitioners complained of.

That the said courts, respectively, erred in holding and deciding valid and not repugnant to the Constitution of the United States the aforementioned provisions in that behalf of the said statute of the State of New York by the tenor whereof the vacating of the assessments complained of, or the removal of the cloud cast by the apparent lien thereof upon petitioners' title is forbidden.

That the said courts, respectively, erred in holding and deciding valid and not repugnant to the Constitution of the United States, the provisions in that behalf, of the said statute of the State of New York, by the tenor whereof the liens of the assessments in petitioners' petition complained of are declared to continue until the said assessments are paid; and, petitioners forbidden to, by any suit, process, proceeding or method have the judgment of any court
122 upon the question of the validity of such lien, unless and until the sale by the city of New York of petitioners' property for satisfaction of such lien, and the setting up of claim of title under such sale.

That the said courts, respectively, erred in that the said order and judgment were for and in favor of the said The City of New York, respondent, when the same should have been for and in favor of the said The New York Central and Hudson River Railroad Company, and The New York and Harlem Railroad Company, respectively, petitioners.

In order that the foregoing assignment of errors may be and appear of record, the petitioners present the same to the court, and pray that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

THOMAS EMERY, *Of Counsel.*

364.

STATE OF NEW YORK, } ss:
County of New York, }

I, William Sohmer, clerk of the said county, and clerk of the supreme court of said State for said county, do certify, that I have compared the preceding with the original record, in the matter of the petition of the N. Y. C. — H. R. R. R. &c. &c. filed Jan. 17th, 1901 on file in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 18th day of Jan. 1901.

Seal New York.

WM. SOHMER, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled Jan. 18, 1901. W. S. }

123 [Endorsed:] Supreme Court of United States. In the matter of the petition of the N. Y. C. & H. R. R. R. Co., as lessee, and the N. Y. & Harlem R. R. Co., as owner, to vacate assessments (1) for regulating, etc., Vanderbilt avenue east; (2) for paving Park avenue. Assignment of errors. Ira A. Place, attorney for appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

Endorsed on cover: File No. 18,028. New York supreme court. Term No. 234. The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company,

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No. 234.

Brief of Emery for P. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 234.

Filed April 3, 1902.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY AND THE NEW YORK AND HARLEM RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

IRA A. PLACE,
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of Counsel.

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SUPREME COURT OF THE UNITED STATES.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and THE NEW YORK AND HARLEM RAILROAD COMPANY, Plaintiffs in Error, *vs.* THE CITY OF NEW YORK.	October Term, 1901. No. 234.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of Facts.

This is a proceeding by writ of error to the Supreme Court of the State of New York (p. 58), allowed by his Honor Justice Brown (p. 59), to review a final judgment of and rendered and entered by said Supreme Court of said State at Special Term, of date July 21, 1899, denying upon the merits the prayer of plaintiffs' petition (p. 10); which said judgment was upon appeal thereto affirmed by the judgment of the Appellate Division, First Department, of said Supreme Court, rendered and entered of date March 9, 1900 (p. 39); and the said judgment of the Supreme Court, Special Term, and Supreme Court, Appellate Division, First Department, respectively, were, upon appeal thereto, affirmed by the judgment of the Court of Appeals of the said State, rendered and entered of date June 22, 1900; and, by remittitur of that date the said Court of Appeals remitted the said notice of appeal, return and record to the said Supreme Court before the Justices thereof to there remain and be enforced according to law (p. 1); whereupon by order of the said Supreme Court of date June 29, 1900, the said orders and judgments of the said Appellate Division, First Department, and of the said Court of Appeals, respectively, were made the order and judgment of the said Supreme Court (pp. 44, 45); and final judgment rendered and entered according thereto in and by said Supreme Court of date October, 18, 1900 (pp. 45–47).

In and by their objections to the certain assessments in question herein, presented before the board of assessors (pp. 35, 36), as also in and by their said petition filed in and presented to and before the said Supreme Court of the State of New York (pp. 4–8), the said plaintiffs alleged ownership

in fee by plaintiff The New York and Harlem Railroad Company, lease by it to plaintiff The New York Central and Hudson River Railroad Company, and possession by the latter, as such lessee, of the certain therein described railroad right of way grounds of the width of 66 feet, with the four-track railroad thereon, paralleling and extending upon and along and bounded easterly by the westerly line or side of the public highway known as Park Avenue, otherwise known as Vanderbilt Avenue East, from the line between the 23d and 24th Wards to 177th Street, and of other lands adjoining and situate westerly of said railroad right of way grounds, all situate in the Borough of the Bronx in the City of New York, and all held, owned, used and occupied in no other wise than exclusively for railroad purposes; and that under and by the terms of the said lease the said lessee therein covenants and agrees to pay all taxes, charges and assessments, ordinary and extraordinary, that may be imposed or assessed in any way thereon (pp. 4, 7).

Plaintiffs in and by their said petition further alleged, and and prayed judgment and decree thereon, as follows, to wit:

"That the grade of the said Park Avenue, or Vanderbilt avenue east, is from 10′ 5″ to 18′ 3″ above the level of the grade of the roadway and tracks of your petitioners, as shown upon the cross-sections thereof which are hereto annexed and marked 'Exhibit D,' which is hereby made a part of this petition, and that there is no access possible from the said lands of your petitioners to the said Vanderbilt avenue east, but, upon the contrary, that the said lands and roadway of your petitioners were heretofore under a contract made by and between the department of public parks in the city of New York, and your petitioners, The New York and Harlem Railroad Company, dated January 11, 1888, which said contract was made, entered into, executed and carried out under the provisions of chapter 721 of the Laws of 1887, depressed to their present grade and solid stone retaining walls built upon and along the easterly and westerly sides of the said lands in order that access to and from public streets and avenues, including that part of Park avenue, or Vanderbilt avenue east, between said ward line and 177th street, should be cut off and rendered impossible.

That the total amount of the said assessment first above mentioned for regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from ward line to 177th street, is $10,994.41, of which the said sum of $4,687.82 was made, laid or imposed upon the land of your petitioners as aforesaid; that the total amount of the said assessment secondly above mentioned for pav-

ing Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, is $26,167.14, of which the said sum of $12,626.72 was made, laid or imposed upon the land of your petitioners as aforesaid.

And your petitioners further show that the improvements for which the said assessments have been made, laid or imposed are local improvements, and that in the said proceedings under which the said assessments have been made, laid or imposed substantial errors have been committed, among which are the following:

FIRST.—That the said lands owned, occupied and used by your petitioners as aforesaid and upon which said assessments have been made, laid or imposed are not houses and lots within the meaning of the said ordinances and statutes, and that the said lands owned, occupied and used by your petitioners, as aforesaid, have not been, will not be, and cannot be, benefited in any manner by the said improvements.

SECOND.—That there was and is no authority of law for the assessment upon the said lands owned, occupied and used by your petitioners as aforesaid, and upon which said assessments have been made, laid or imposed for the total cost or any part of the cost of the said improvements.

THIRD.—That the cost and expense of the said work in making said improvements have not been distributed equally or in proportion to the benefit upon the houses and lots fronting upon said Vanderbilt avenue east, and upon all the houses and lots benefited thereby and assessable therefor.

Wherefore, your petitioners pray that the said assessments be vacated and that the lien or liens created thereby, or by any subsequent proceedings, cease, so far as the said assessments affect the said lands owned, occupied and used by your petitioners as aforesaid, and that the collector of assessments and arrears, the clerk of arrears, the comptroller, and the deputy comptroller of the city of New York, be each directed to cancel and discharge said assessments and liens, or apparent liens, upon the records in their respective offices, so far as the same affect the said lands of your petitioners" (pp. 7, 8, 9).

The evidence adduced at the hearing upon said petition established the following facts:

Vanderbilt Avenue East runs northerly and southerly, and its westerly line is the easterly line of the roadway owned by the petitioner The New York and Harlem Railroad Company,

and leased to the petitioner The New York Central and Hudson River Railroad Company. This roadway is a strip of land 66 feet in width, acquired by The New York and Harlem Railroad Company by purchase in 1842 (pp. 12 and 24), for the purposes of its railroad. The statutory provision in regard to the acquisition of this strip of land is contained in the charter of The New York and Harlem Railroad Company, Section 8, Chapter 263 of the Laws of 1831, and is as follows:

> "It shall be lawful for the said corporation to enter upon and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double rail-road or ways, and may also receive, hold and take all such voluntary grants and donations of land and real estate as shall be made to the said corporation, to aid in the construction, maintenance and accommodation of the said single or double rail road, or ways."

At the time when such strip of land was acquired Vanderbilt Avenue East had not been laid out or opened, or even indicated or shown on any filed map (p. 14). Adjoining this strip, used for right of way, on the west, another parcel has been acquired by The New York and Harlem Railroad Company by various deeds (pp. 12, 13); and as to this parcel, in addition to the provisions of the charter, the deed conveying the principal part thereof (p. 12), provides that it "shall be used solely and only for the purposes of a railroad and station house to be thereon erected."

Upon the 66-foot strip four tracks have been constructed in a depressed cut. The grade of these tracks is from 11 feet 1 inch to 18 feet 8 inches below the grade of Vanderbilt Avenue East (p. 38, Petitioners' Ex. 19). Prior to January 11, 1888, the railroad was a two-track railroad at grade. It was depressed at large expense, borne wholly by the railroad company, under a contract bearing that date, made between the railroad company and the Department of Public Parks (then having jurisdiction over streets and avenues in the 23d and 24th Wards), pursuant to the provisions of Chapter 721 of the Laws of 1887. The purpose of the depression was to free the railroad company, the city and the public from the burden of grade crossings, and to prevent absolutely all access from public streets or avenues to the railroad tracks (p. 15). That purpose was accomplished, and as a matter of fact there is now no access from Vanderbilt Avenue East to any of the lands of the petitioners upon which the assessments complained of were levied. The form of construction of the depressed railroad is shown on the cross-section, Exhibit D, annexed to the petition, from which it will be seen that Vanderbilt Avenue East is abso-

lutely separated from the railroad lands by a permanent stone retaining wall, and also by a picket fence erected upon the division line between the railroad lands and the avenue (Ex. 13 g, opp. p. 11).

The inception of Vanderbilt Avenue East was its appearance on certain maps, two dated in 1848, and one in 1851 (pp. 13, 14). The avenue, or parts of it, appear upon these maps as Railroad Avenue. Later, and at the time proceedings were instituted by the City to open it, it was known as Vanderbilt Avenue East, and is now known as Park Avenue East.

Except for this indication on these maps, it does not appear that any steps were taken to make it a public street or avenue until the proceedings instituted by the Commissioners of the Department of Public Parks, which resulted in the acquisition of title to the land of this avenue, the report of the Commissioners of Estimate and Assessment being confirmed August 11, 1887 (pp. 18, 26). It will be observed that this was prior to the depression of the tracks under the contract of January 11, 1888, that is, while the railroad was at grade. It appears from these proceedings and from the proceedings on the appeal taken from the order confirming the report of Commissioners (see 47 Hun, 302), that the Commissioners of Estimate and Assessment did not regard the avenue as of any benefit to the railroad company, and their judgment was approved by the Court, both at Special and General Terms.

Under the resolutions of the Common Council authorizing the improvements to defray the cost of which the assessments complained of were made, no part of the cost of the improvements was to be borne by the City at large, but the entire cost was to be assessed

> "*among the owners and occupants of all the houses and lots intended to be benefited thereby, in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire.*" (Sec. 878, Consolidation Act; Exhibits A and B, attached to Petition, Sec. 402, Charter.)

The direction of the Statute to the Board of Assessors is: "*the Board of Assessors shall assess upon the property benefited.*" (Consolidation Act, § 868; Charter, § 946.)

The charter provision in reference to sale of property for non-payment of taxes or assessments (Sec. 1027) is, that the collector of assessments and arrears, under the direction of the comptroller, may cause the lands to be sold at public auction for the lowest term of years at which any person or persons shall offer to take the same in consideration of advancing the taxes, assessments and water rents, and interest thereon to the time of sale; and (Sec. 1041) that if such lands be not redeemed from such sale a lease shall be executed for such term

of years as the same shall have been sold, and that all such leases "shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessments on said lands and tenements for taxes or assessments or water rents, * * * were regular and according to the provisions of the statute in such cases made and provided."

The provisions of the charter, whereby the lien is made perpetual, is as follows:

> "All taxes and all assessments for local improvements and all water rents, and the interest and charges thereon, which may, in the City of New York, as by this act constituted, hereafter be laid or may have heretofore been laid, upon any real estate now in said city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges."

This latter provision (Sec. 1017) is held by the Supreme Court, General Term, First Department,

> "designed according to its express language to continue the lien of the assessments in force until actual payment should be made of the amounts as distinguished from a mere presumption of payment,"

and the lien was held to be an existing one after the lapse of more than twenty years from the time at which it attached.

Daly v. *Sanders*, 9 N. Y. St. Rep., 794.

As evincing that, so far as in that behalf a prerequisite to their resort to equity, plaintiffs had exhausted their statutory remedies, plaintiffs in and by their petition averred, and upon the hearing thereof made proof of the timely presentation in proper form, of their objections to and protests against each of the said respective assessments, as being unfair, unequal, inequitable and unjust (pp. 6, 7, 25, 36), and upon the trial thereon in the Supreme Court it was "conceded that on the filing of objections by petitioners, petitioners offered to introduce evidence showing that the physical condition of the road was the same as it is shown to be by the evidence in this proceeding, and that the board stated it was unnecessary to introduce such evidence at that time, as they knew such to be the physical situation of petitioners' land, and on that ground declined to receive such evidence" (p. 23).

It was also proven and undisputed that under and in pursuance of previous agreement still in force between the city and the plaintiffs the said railroad tracks and surface of the right of way grounds of plaintiffs had been placed and were required to remain at the alleged depth below the grade of said avenue and bounded by retaining walls and fence with the intent and to the effect of rendering access from either to the other impossible at any and all points along the line and within the

bounds of the improvements for which the said respective assessments were so laid and imposed (pp. 13, 14, 15, 19, Map, p. 139, and Exhibit G, opp. p. 11).

The land lying westerly of the railroad and cut off by it from access to this avenue obviously could not be specially benefited by improvement of such inaccessible avenue.

The conclusive evidence of impossibility of benefit resulting to this railroad property by the improvements of this avenue, consisting of the character and use of the property and its physical relations to the avenue, rendering access from one to the other impossible, was supplemented by the uncontradicted testimony of the witnesses Arthur Haviland (pp. 15, 16, 17), and Edgar Van Etten (pp. 19, 20, 21), to the effect that the property assessed was not specially benefited by these improvements of the avenue in any respect or sum whatsoever.

If and in so far as the official reports of the board of assessors might be deemed of force or effect to meet the evidence presented by the plaintiffs, those reports are effectively shown not to be entitled to substantial consideration or weight, because, notwithstanding the peculiar and especial considerations demanded by the nature, character and relative situation of this railroad property, as regards the avenue, and the improvements thereon, the uncontradicted testimony of the witness William H. Jasper, the then and for many years secretary of that board, establishes that no regard whatever was had to these peculiar conditions, and their existence in no wise considered; but, on the contrary, the properties abutting on the easterly side of the avenue were assessed in excess of the westerly side merely because and to the extent of the cost of additional curbing and flagging required for and placed upon the east side, more than upon the west side of the avenue, and, subject only to this exception, the respective assessments were apportioned, imposed and laid in conformity with the previously "fixed rule governing works," adopted by that board "that the area of assessments in improvements of this kind shall be each side of the street improved and for one-half a block on either side." That under and in obedience to this previously promulgated general direction or fixed rule of the board the commissioner of highways furnished his certificate of the area of the assessments, attached to a map thereof made by the surveyor who had charge of the work of the improvements. That, only in this most general sense, was it, that the area and apportionment of these respective assessments were fixed, and the map thereof made, under the direction and order of the board of assessors, and this certificate and map of area thereof, identical as to both assessments, accepted as showing the area and apportionment of assessment (pp. 22, 23, 24).

Having in advance, adopted a fixed rule of foot frontage, and half block each side area, to govern the laying and apportioning of assessments, and thereunder had the highway commissioner certify, and the surveyor map, the assessment area, regardless of varying abutting property conditions, uses and exigencies, the assessing board's carrying out of such arbitrary apportionment, or more properly speaking, refusal to apportion, was in keeping with the subsequent declination of the board to receive evidence of existing conditions of the property, in support of plaintiffs' objections to and protests against said assessments.

The petitioners contended before both trial and appellate courts that their property had not been, will not be, and cannot be, benefited in any manner by the improvements for which these assessments were laid. This contention is supported, first, by the physical facts above set forth, from which it is clearly apparent that there can be no benefit; secondly, by the evidence offered by the petitioners upon the hearing, and not disputed by the City; it did not controvert, or attempt to controvert, them, either by answer to the petition or by any evidence upon the hearing; the fact stands practically undisputed that the petitioners' property had not been, will not be, and cannot be, benefited in any manner, or to any extent, by the improvements for which these assessments were laid.

The petitioners also contended before the trial court and in both appellate courts that upon proof or concession of entire absence of special benefit from the local improvements the assessments should be vacated; and, that, if and so far as the statute (City Charter, Sec. 962) purported to deny to them that remedial right it was violative of their rights guaranteed by the Constitution of the State and by that of the United States (pp. 48–56).

The refusal of the Appellate Division to interfere with the determination of the Special Term was based solely upon the ground that the Court had been deprived by Section 962 of the Greater New York Charter of the right to grant the prayer of the petitioners and to vacate the assessments, that "the court is given the power to reduce an assessment, but deprived of the power to vacate it. It may correct an error, but it cannot entirely wipe out the assessment itself" (pp. 40 to 43). The Court of Appeals affirmed "on opinion below" (p. 56).

Thus the case alleged in plaintiffs' complaint, and established by the evidence is that of assessments, each by the charter provision constituting a perpetual colorable lien, apparently, upon the face of the records thereof, in all respects regular and valid; but, upon proof *aliunde* the record, shown, and practically conceded, in both trial and appellate courts, to be based upon conditions of fact rendering them wholly unauthorized

and void; and refusal of the State courts to vacate these assessments and adjudge them void solely by reason of the State statute purporting to forbid exercise of the jurisdiction in that behalf invoked.

FIRST POINT.

The right of an owner to hold and dispose of title to property free of unfounded and unjust cloud or restraint, is, in and of itself, property within and the subject of protection of the Federal Constitution.

The right and power of the reasonably free and untrammelled disposal of property is in itself property, and as manifestly the subject of constitutional protection as is the physical thing to which such right pertains.

The respective words *life*, *liberty* and *property*, as used in the Fourteenth Amendment of the Constitution of the United States are each used in the broad and popular sense, and not in a cramped or restricted sense.

The case of *Wynehamer* vs. *The People*, 13 N. Y., 378, presented among other questions, that of the constitutionality of the act "to prevent intemperance, pauperism and crime," in that it interfered with the disposal of that class of property to which the act had reference.

The Court of Appeals, speaking upon this subject, by Comstock, *J.*, at page 396, says:

> "Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature, property did not exist at all. 'Every man might then take to his use what he pleased, and retain it if he had sufficient power, but when men entered into society, and industry, art and sciences were introduced, property was gained by various means, for the securing whereof, proper laws were ordained.' (Tomlyn's Law Dic., Property; 2 Bl. Comm., 34.) Material objects, therefore, are property, in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are fundamentally the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression, destroys the notion of property, although the things themselves may remain physically untouched.

"Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Comm., 138), 'The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Comm., 320), 'The exclusive right of using and *transferring* property, follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326), 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' By another author property is defined as an 'exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or giving them away to any other person without consideration, or even throwing them away.' (*Bouvier Law Dic. tit. Property.*) These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made."

The same Court, in the case of *Matter of Jacobs*, by Mr. Justice Earl, says:

"The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property." * * * "Blackstone, in his classification of fundamental rights, says: 'The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution, save only by the law of the land.' (1 Com., 138.) In Pumpelly *vs.* Green Bay Co. (13 Wall., 166, 177), Miller, *J.*, says: 'There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution.' In Wynehamer *vs.* People (13 N. Y.,

378, 398), Comstock, *J.*, says: 'When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power.' In People *vs.* Otis (90 N. Y., 48), Andrews, *J.*, says: 'Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision.'"

Matter of Jacobs, 98 N. Y., 98.

And again, by Mr. Chief Justice Ruger, as follows:

"We do not think it is competent for the legislature to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the State for relief.

If, as we have seen, he is denied all remedy for the wrong inflicted upon him, the deprivation of his property becomes just as effectual as though it had been taken from him by direct legislative enactment." * * * "A statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another. (*Matter of Jacobs*, 98 N. Y., 98, and authorities there cited.) In the one case it despoils the owner directly, and in the other renders him defenseless against any assault upon his property.

Authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional provision as when it attempts to do the same thing directly."

Gilman vs. *Tucker*, 128 N. Y., 190.

The Supreme Court of Wisconsin, speaking upon this subject, says:

"Any restriction or interruption of the common and necessary use of property that destroys its value or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the Constitution."

Janesville vs. *Carpenter*, 77 Wis., 288.

Mr. Justice Bradley, in his dissenting opinion in the case of *Campbell* vs. *Holt* (115 U. S., at page 630), speaks of the Fourteenth Amendment as follows:

"That clause of the amendment which declares that 'no State shall deprive any person of life, liberty or property without due process of law,' was intended to protect

every valuable right which a man has. The words life, liberty and property are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term 'property,' in this clause, embraces all valuable interests which a man may possess outside of himself, that is say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right." * * *

"Remedies are the life of rights, and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away."

And this Court, by Mr. Justice Miller, says of it the following:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Pumpelly vs. *Green Bay Company*, 13 Wall., 166.

In *Marbury* vs. *Madison*, 1 Cranch., 137, this Court, speaking by Mr. Chief Justice Marshall, at page 163, announces the following:

"The very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, p. 23, Black-

stone states two cases in which a remedy is afforded by mere operation of law.

'In all other cases,' he says, 'it is a general indisputable rule that where there is a legal right there is also a legal remedy by suit, or action at law, whenever that right is invaded.'

And afterwards, p. 109, of the same volume, he says, 'I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

As is tersely stated by Campbell, *Ch. J.*, in announcing the unanimous decision of the Supreme Court of Colorado:

"Property, as such, has no claim upon the protection of the law. When a property-right is spoken of, the right of some person over or concerning the property is meant. All rights recognized by the law pertain to persons, natural or artificial. The absolute rights are commonly designated as personal rights. They are such as are annexed to the person, like life and reputation, while property rights are those unconnected with the person, but which, none the less, belong to some person. All rights, both those spoken of as personal and those denominated as property rights, belong to the individual citizen; and when it is said that property rights must not be infringed, what is meant is merely that the right of some person to or concerning property must not be interfered with."

Re Morgan, 26 Colo., 415; 47 L. R. A., 52, 56.

Direct and immediate prejudice to petitioner The New York Central and Hudson River Railroad Company appears in that it must take the risk of a forfeiture of its lease, which provides that

"It will pay the taxes, charges and assessments, ordinary and extraordinary, that may be imposed or assessed in any way on said railroad, branch, or property, or any part thereof, or upon or against the said party of the first part by reason thereof" (page 5 of the lease; p. 25, Ex. 7.)

Although the assessments here complained of are absolutely void, yet if the owner or lessee should enter into a contract to convey its interest in the lands upon which the assessments are imposed, free and clear of incumbrances, the vendee would be justified in rejecting the title, on account of these assessments.

Chase vs. *Chase*, 95 N. Y., 373.
Moore vs. *Williams*, 115 N. Y., 586.
Webster vs. *Kings County Trust Company*, 145 N. Y., 275.

In the *Chase* case it was held that a vendee could be compelled to accept the title solely upon the ground that the Court of Appeals had *In the Matter of Deering*, 85 N. Y., 1, declared the entire assessment void. The inference is that if it had not already been declared void by the Court of last resort, the vendee in the *Chase* case would have been justified in rejecting title. The assessment involved in that case was void upon its face. Much more would the vendee be justified in rejecting the title by reason of the assessments complained of here.

In *Maupin* on "*Marketable Titles to Real Estate*," Section 283, it is said:

"A purchaser of lands can never be required to accept a doubtful or unmarketable title, even though the fullest indemnity be offered by way of a general warranty from a solvent vendor. * * * If there is such doubt as to make it probable that the purchaser's right may become a matter of investigation, he will not be compelled to complete the purchase. * * * If a defect appear, and the title depends upon facts removing it, which facts the purchaser can only establish by parol testimony, should his title be afterwards attacked, the purchaser will be relieved."

See the cases cited under this section.

The same author further says, in Section 289:

"It has been frequently held that if parol evidence should be necessary to remove any doubt as to the validity and sufficiency of the vendor's title, the purchaser cannot be compelled to complete the contract. He cannot be required to take a doubtful title which he must fortify, if impugned, by resorting to evidence perishable in its nature, and possibly unavailable to him when the necessity for it occurs."

See *2 Beach's Modern Equity Jurisprudence*, Section 268.
Seamon vs. *Delancey*, 1 Hopkins (N. Y.), 436.
Moore vs. *Williams*, 115 N. Y., 586.
Irving vs. *Campbell*, 121 N. Y., 353.
Murray vs. *Harway*, 56 N. Y., 337.

The same author, in treating specifically of the incumbrances upon premises which will justify a purchaser in refusing to go on with the purchase until the objection be removed, divides such incumbrances into two classes:

(1) Those in which the existence of the incumbrance is admitted, or free from doubt; and (2) those in which the fact of existence of the incumbrance is a matter of doubt or dispute. The assessments complained of belong to the second class, and in Section 306 the author says:

> "Neither will the purchaser be compelled to complete the contract when the existence of the incumbrance, or its extension to the purchased premises, is a doubtful question of law or fact."
>
> "The rule that the purchaser cannot be compelled to take a doubtful title applies as well where the doubt is as to the existence and enforceability of the incumbrance upon the premises as where the doubt is as to the existence of some fact, or the construction of some instrument upon which the title is founded."

See *Garnett* vs. *Macon*, 6 Call (Va.), 308, 369.
Rose vs. *Calland*, 5 Ves., 189.

SECOND POINT.

Bills to remove clouds upon title, founded upon instruments or proceedings valid upon the face thereof, and their invalidity provable only by evidence *aliunde*, are remedies the right to which ante-dated the State organization, and the existence thereof and right thereto was and is recognized and sanctioned in its organic law.

By way of preliminary observation we submit that the fact, if it be a fact, that the State Constitution purports to authorize the Legislature to enact the statutory provisions, the validity of which are here called in question, in nowise disposes of the questions presented, because, the State Constitution is as much as State legislation, subject to the rules for the protection of private property prescribed by the Federal Constitution.

> "It is well settled that a provision in a State Constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute. We are of opinion, therefore, that, as it regards plaintiff's case, this

restrictive provision of the Constitution of 1880 does impair the obligation of a contract."

Fisk vs. *Jefferson Police Jury*, 116 U. S., 131.

Or, if it be contended that the statute as enacted is not violative of the Federal Constitution, and that such violation results from the judicial construction which the State courts have given the statute, such contention does not tend to either oust the jurisdiction of the United States Supreme Court nor prevent it adjudging that the statute as thus construed is violative of the Federal Constitution.

"It is said, however, that it is not the validity of the Act of 1860 which is complained of by plaintiffs, but the construction placed upon that act by the State court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no State legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

Bridge Proprietors vs. *Hoboken Co.*, 1 Wall., 116, 144.

In the earliest reported New York case which we have found wherein the jurisdiction of the Chancellor was invoked for relief against a cloud on title, the case and opinion reported are as follows:

"This was a bill to set aside, and to have cancelled, a deed, purporting to have been executed on the 6th day of February, 1790, by N. Gorham and O. Phelps, to William Ewing, in fee, for undivided parts of certain lots of land lying in the County of Genesee, and recorded in the Clerk's office of that county, on the charge that it had been falsely and fraudulently altered.

The defendants were the infant children of Ewing, who was dead, and his wife, who had married the defendant Harford. The cause was put at issue and proof was taken of the fraudulent alteration of the deed; and the fraud was shown to be of a very gross kind, and clear, beyond all contradiction. It appeared from the pleadings and proofs that the defendants, Harford and his wife, had brought an ejectment suit upon the deed, which was tried at the Genesee Circuit, where the felonious alteration of the deed was made out to the satisfaction of the Judge and jury, and a verdict found for the tenant in possession. Since that trial these defendants had procured the deed to be proved by a very aged subscribing

witness, since dead, and to be recorded, and had threatened the prosecution of a new action of ejectment.

The cause was submitted upon the pleadings and proofs.

The Chancellor thought it too clear a case to need discussion, and directed that the deed, which was in Court, should be cancelled as being a fraudulent, forged and void deed, and that the defendants, and all persons claiming under them, should be perpetually enjoined from using the record of the deed as evidence of title, and that the decree should be binding upon the infant defendants, unless they should within six months after they respectively attained the age of twenty-one years, upon being served with process for that purpose, show to the Court good cause to the contrary. And, inasmuch as the defendants, Harford and his wife, had not rested satisfied with the trial in the ejectment suit, but had since procured the deed to be proved by a very aged subscribing witness, since dead, without notice thereof to the plaintiff, and had caused the deed to be recorded, they were ordered to pay costs of this suit to the plaintiff."

Bushnell vs. *Harford*, 4 Johns. Ch., 301.

Another early case, of this character, *Apthorpe* vs. *Comstock*, is thus stated (1 Hopk. Chancery, 143):

"The object of the bill in this cause was for relief against a deed of conveyance of lands alleged to be forged or fraudulent, or otherwise invalid, and for an injunction to restrain the prosecution of certain actions of ejectment grounded on the deed."

The decision of the Court of Errors upon it is reported in 8 Cowen's Rep., 386. It was again before the Trial Court and reported in 2 Paige Ch., 482, where the following announcement is made:

"The Chancellor: It is not necessary for me to examine the question whether this is a proper subject of equitable jurisdiction. This question was distinctly raised before Chancellor Sanford on the motion to dissolve the injunction in this cause and in the Court of Errors on the appeal from his decision. In both cases the jurisdiction of this Court was sustained. I have no doubt of the correctness of these decisions. But if I were of a different opinion, I am not at liberty to overturn the decision of the Court of Errors, which has now become the law of the case, on that point. I have looked into the several opinions delivered in the Court of Errors and find this question must have been passed upon by that Court. The jurisdiction of the Court in this case has been sustained on the ground of the alleged forgery of the deed to Enoch Comstock; or, upon the

charges in the bill, that it is now attempted to be used for the purposes of fraud; that the proof endorsed upon the deed whereby it was admitted to be recorded, was surreptitiously obtained by an imposition on the Commissioner and by perjury; that the deed remains a cloud upon the complainant's title and cannot be removed from the record, and that the title cannot be settled so as to prevent a multiplicity of suits without the aid of this Court."

Under authority of English Statutes and Colonial Ordinances the Court of Chancery of this Colony was established in 1683, to "have power to hear and determine all matters of equity and shall be esteemed and accounted the Supreme Court of this Colony." * * * "This Court until the Revolution was in the hands of Governors of the Colony when, by the Constitution of the State (adopted in 1777), it was recognized as a Court and a Chancellor directed to be appointed." * * * "The Court of Chancery was first organized *in this State*, March 16, 1778."

Laws of New York, 1813, page 494, note.

The State Constitution, adopted November, 1846, in force January 1, 1847, provided:

ART. VI. SECTION 3. "There shall be a Supreme Court having general jurisdiction in law and equity," and

ART. XIV., SECTION 5, provided that "jurisdiction of suits and proceedings" pending in the Court of Chancery on the first Monday of July, 1848, "shall become vested in the Supreme Court hereby established."

The above provisions of Art. VI. Sec. 3, were continued in the amendment of this article, framed by the Constitutional Convention in 1867 and adopted in 1869.

The Constitution, adopted in 1894, and in force January 1, 1895, contains a like provision, to wit: "The Supreme Court is continued with general jurisdiction in law and equity."

ART. VI. SEC. 1.

Under the said provisions of the Constitution of 1847, the Court of Appeals, at its March, 1849, term, held "That the Supreme Court, as now organized has the same jurisdiction as that Court formerly had, with the addition of the equity jurisdiction of the late Court of Chancery."

Sherman vs. *Felt*, 2 N. Y., 186.

The principle here invoked is aptly expressed by Mr. Chief Justice Marshall in *Cohens* vs. *Virginia*, 6 Wheaton, at page 384, where he says:

"While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction

which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say that this fitness furnishes an argument in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring whether the words of the instrument which purport to establish this principle, shall be contracted for the purpose of destroying it."

In *De Hart* vs. *Hatch*, 3 Hun, 375, the New York Supreme Court, General Term, Daniels, *J.*, writing, upon this subject, at page 380, says:

"By the provision required to be considered and construed in the disposition of this case, the only court of general jurisdiction thoughout the entire State was established. It provided that there should be a Supreme Court having general jurisdiction in law and equity. The terms used are so comprehensive, that they include all cases of every description in law and equity, from the most important and complicated to the most simple and insignificant, and they imperatively and positively establish the court with that extended jurisdiction. The language made use of, is, that there shall be such a court, having the jurisdiction declared; and that was given to it, not to be exercised or declined as the legislature might afterward provide or enact, or that body and the court combined should at any time elect, but for the purpose of being at all times maintained and preserved for the benefit of those who might be parties to controversies in either law or equity. The jurisdiction conferred upon the court, included both the power to entertain, progress, and, in the end, determine all civil actions, and

the duty also to do those things; and for that reason, suitors in such cases have the right to require them to be done. The jurisdiction was conferred for their benefit, and to secure and promote the stability and good order of the State. It was rendered permanent and uniform in its nature, and as those attributes are provided for it by the fair import of the Constitution, it has not been left to the legislature either to abridge or limit them by any interposition on its part. For, if anything of that kind can be accomplished by legislation, then the jurisdiction can be by law abridged and reduced; and that would so far nullify the provision that there be such a court as the Constitution has described, as such legislation might be made to extend. From the nature of the unqualified jurisdiction created, the legislature very clearly could not have provided that the Supreme Court should not have the power to entertain, hear and decide the case enumerated in the act of 1872. If that could be done, then the jurisdiction of the court would depend upon the legislature instead of the Constitution; and if it should be done, the court would no longer have general jurisdiction in law and equity, as the Constitution has provided that it shall have. If the legislature can declare that the court shall have no jurisdiction over one class of cases, it may do so as to all, and in that way the provision contained in the Constitution could be completely abrogated. A law of that description would hardly be claimed to be capable of being sustained; and yet the difference between such legislation and that embodied in the acts of 1872 and 1874, is neither substantial nor real. If the legislature cannot restrict the jurisdiction of the court, its inability results from the positive declaration contained in the Constitution, as to what its attributes and character shall continue to be; and that will prevent the same thing from being done by the combined action of the legislature and the court together. The court has no legislative authority, and no power to decline or refuse the jurisdiction provided for it by the Constitution. If it had, it might impair and abridge its jurisdiction so far as to render the tribunal comparatively useless, which, the Constitution had declared, shall be the most comprehensive in the State. Upon this subject, neither the court nor the legislature has any power of election whatever. The court exists solely under the Constitution, and while it does so, it must be what that instrument has declared it shall be: a court of general jurisdiction in law and equity. And that includes the authority, as well as the duty, of hearing and

deciding all actions of a legal or equitable nature; for the term, general, includes all."

And the Court of Appeals, by Rapallo, *J.*, says:

"The Constitution of this State (Art. 6, Sec. 12) continues in the Superior Court of the City of New York, and certain other courts, the powers and jurisdiction which they had at the time of the adoption of that article.

This provision, unquestionably, deprived the Legislature of all power to take from those courts any of their then existing jurisdiction." * * *

"We are of opinion that, as the Constitution declares that the jurisdiction shall remain in the court, the court itself cannot relinquish or transfer that jurisdiction, and that any act authorizing it so to do violates the constitutional provision. If this provision were intended solely for the protection of the court or its judges they might waive it; but we do not think it was so intended. It was, in our judgment, like the whole judicial system of the State, intended for the benefit of the people, and to secure to litigants a forum in which they might have their controversies adjudged. The jurisdiction which the Constitution preserves in the courts named is inalienable, and carries with it the corresponding duty on the part of those courts to exercise it, when called upon in proper form so to do. The constitutional provision protects the parties to an action, brought in either of those courts, in the right to require it to adjudicate the controversy between them."

Alexander vs. *Bennett*, 60 N. Y., 204.

And again, by Martin, *J.*:

"The Legislature is not vested with the power to arbitrarily provide that any procedure it may choose to declare such shall be regarded as due process of law. If it possessed that power, the guarantees of the Constitution would be rendered unavailing, and private rights of citizens would be within its absolute control."

Colon vs. *Lisk*, 153 N. Y., 188.

The Amr. and Eng. Encyc. of Law (2d ed.) states the following:

"Since the Constitution of its own vigor, and as the sole source of all delegated authority, vests the judicial power in designated tribunals, it follows that the essentials of jurisdiction there conferred are unalterable and indestructible, and can neither be increased nor diminished by the Legislature, nor can the inherent powers of courts thus established be abrogated or abridged."

6 Amr. & Eng. Encyc. of Law (2d ed.) 1048.

"Jurisdiction cannot be indirectly destroyed by depriving a party of the right to appeal to the courts for redress of a legal wrong."

Id. 1049.

The Supreme Court of Michigan, by Campbell, *J.*, says:

"It is within the power of the Legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights."

Brown vs. *Buck*, 75 Mich., 274.

In a case instituted in the Supreme Court of Tennessee, under the supposed authority of a legislative enactment purporting to confer upon the court original jurisdiction of such proceeding, whereas the Constitution provided that its jurisdiction should be appellate only, the court, in an opinion delivered by Caruthers, *J.*, says:

"Have we authority under the Constitution to exercise the powers here conferred; or, in other words, is this act of the Legislature constitutional? is the first question to be considered. We cannot, without a violation of the Constitution, to which we owe our existence as a court, and which we have sworn to obey, transcend the limits therein assigned to us. With every disposition to respect and obey the mandates of the legislative department of the government, we are bound to stay our hands when we reach the limits prescribed for us in the fundamental law. Beyond that we dare not go, no matter what authority may command. We cannot obey two masters where their commands conflict. The Constitution is the chart by which we must govern our official action."

The State vs. *The Bank of East Tenn.*, 5 Sneed, 573.

In *Commonwealth* vs. *Commissioners* the opinion of the Pennsylvania Supreme Court was delivered by Woodward, *J.*, who says:

"1. It is objected that the writ was issued out of this court whilst it was sitting in the Eastern District; and hence, it is argued, the Commissioners are not amenable to it.

The 5th Article of the Constitution establishes the Supreme Court, and invests it with a jurisdiction co-extensive with the State. The jurisdiction must exist at all times in its entirety. If this Legislature could suspend it for an hour in one part of the State, it might suspend it for a day or a month in another part, and thus virtually abolish it altogether. The jurisdiction was conferred by the whole people of the State for their own benefit, and is held in trust for them. They have given the Legislature

no power to suspend, abridge or annihilate it. The Legislature have divided the State into districts for the sessions of the court to hear arguments, and the arrangement has been acquiesced in as convenient for the business of the court; but there is not a word in the Constitution about districts of the Supreme Court. The Constitution speaks of districts for the Court of Common Pleas; but everywhere treats the Supreme Court as an institution of the State. If the legislation which divides the State into districts, for the sessions of the court, were to be held to limit the range of the court's writs to the district in which the court was sitting, it would be a palpable infraction of the fundamental law."

37 Pa. St. Rep., 237.

Guy vs. *Hermance* was an appeal from an order granting an injunction restraining the defendants from selling certain property in the City of San Francisco. On the 18th day of May, 1853, the Legislature of California passed an act entitled: "An Act to provide for the sale of the interest of the State of California, in the property within the water line front of the city of San Francisco." The defendants, in pursuance with the terms of the Act, were duly appointed Commissioners, to examine into, and make sale of such interest, and as such advertised the property of the plaintiffs for sale, in order to satisfy whatever interest the State of California might have therein.

Huydenfeldt, *J.*, delivered the opinion of the Court; Murray, *C. J.*, concurred. The opinion announces as follows:

"2. The Legislature cannot exercise judicial functions, and, therefore, cannot except one case, or one party, from the operation of a general rule of law, either as to right or remedy. That portion, therefore, of the act of May, 1853, entitled: 'An Act to provide for the sale of the interest of the State of California in the property within the water line,' &c., which prescribes that no injunction shall be issued against the Commissioners, is invalid.

3. The right of a party to have his title to land protected from a sale which might create a cloud upon it, was upheld by this Court in the cases of Smith *vs.* Morse, 2 Cal., 524; Shattuck *vs.* Carson, 2 Cal., 588. Judgment affirmed."

5 Cal., 73.

THIRD POINT.

Assessments for local improvements founded upon proceedings valid on the face thereof, but by evidence *aliunde* proven invalid upon grounds rendering the assessing authorities powerless to impose assessment, constitute clouds upon title within and subject to, the reason and principle governing such remedy.

This general doctrine as regards equity jurisdiction is thus stated in High on Injunctions (3rd ed.). Sec. 524:

> "The most generally recognized exception to the rule that equity will not interfere with the collection of the revenue because of defects or illegalities in the proceedings, is in cases where the proceedings, if not enjoined, would result in clouding the title to real estate. Thus, where the defect is not merely a formal one, but works a substantial injury to complainant's rights, resulting in a cloud upon his title, the injunction will be granted. And where the proceedings sought to be set aside are valid upon their face and extrinsic facts are necessary to be proven to show their invalidity or illegality, equity will interfere to prevent a cloud upon title." * * * * * * "And the jurisdiction to thus interfere for the prevention of a cloud upon title is regarded as pertaining to the well settled powers of equity, which will interfere to prevent such a cloud as tends to diminish the value of the property or cast a doubt upon the title."
>
> Sec. 525: "It is to be observed, however, that where the relief is sought to prevent a cloud upon title it will only be granted in those cases where the illegality or irregularity complained of exists *dehors* the record."
>
> Sec. 526. "In conformity with the general doctrine as already stated, it is held that where the record of the tax proceedings is *prima facie* valid, and extrinsic evidence is necessary to show its invalidity, so that there is no full and adequate remedy at law to correct an abuse of the taxing power, equity may properly interfere by injunction."

Jurisdiction in equity to grant relief against an assessment on its face apparently valid, but by evidence outside the record shown to be invalid, was deemed to be vested in the Supreme Court of the State without the aid of statute.

This conclusion is announced after full discussion and citation of numerous authorities by Masten, *J.*, speaking for the Supreme Court, General Term, in the case of *Lewis* vs. *City of*

Buffalo, 29 How. Pr. Rep., at pages 338 to 344. The jurisdiction is recognized and the facts necessary to entitle complainant to relief under this head are stated and discussed at length in *Scott* vs. *Onderdonk*, 14 N. Y., 9, and *Haywood* vs. *City of Buffalo*, 14 N. Y., 534.

Following the principle of the above cases, the rule thereof is stated by Mason, *J.*, speaking for the Court of Appeals in *Allen* vs. *City of Buffalo*, 39 N. Y., at pages 390, 391, to wit:

> "the rule being, that, when the claim of the adverse claimant to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved to establish the illegality or invalidity, then a court of equity will interpose to remove the cloud. (*Ward* vs. *Dewey*, 16 N. Y., 519, 522; *Scott* vs. *Onderdonk*, 14 *id.*, 9), and I am not able to distinguish the case of *Scott* vs. *Onderdonk*, from the case at bar. It decides the very question presented by this appeal, and I cannot think it has been overruled by this court. The case of *Howell* vs. *The City of Buffalo* should not be regarded as overruling the case of *Scott* vs. *Onderdonk*, as it certainly would overturn the well-settled rule in equity, and overrule a long line of decisions in this State, without reviewing or considering them, and as the case has been withheld from the reports we ought to follow the case of *Scott* vs. *Onderdonk*, which is sound, and fully sustained by the prior cases."

These cases and the fundamental basis thereof as to the source of authority for the jurisdiction exercised therein, are recognized as controlling in the recent case of *County of Monroe* vs. *City of Rochester*, 154 N. Y., 570, wherein Judge Gray writing for an unanimous court, says:

> "Preliminary it may be remarked, with reference to such an action as this, which collaterally attacks the assessment, that it comes under that head of equity which awards relief when the object is to remove a cloud from the title. Judge Folger, in *Marsh* vs. *City of Brooklyn* (59 N. Y., 281), stated the conditions, which entitled the party to invoke the aid of a court of equity, to be 'when the claim or lien purports to affect real estate and appears on its face to be valid; when the defect in it can be made to appear, only, by extrinsic evidence, which will not necessarily appear in proceedings by the claimant thereof to enforce the lien.' This rule, often stated in this Court since the case of *Scott* vs. *Onderdonk* (14 N. Y., 1), and carefully reviewed in *Guest* vs. *City of Brooklyn* (69 N. Y., 506), is well established. The rule is applicable to such a case as this; but the extrinsic evidence, resorted

to in aid of the action, must show the defect relied upon to be one affecting the jurisdiction of the municipal officers and, hence, invalidating the claim to hold the plaintiff's property for the amount of the assessment imposed upon it. * * * What is essential to the maintenance of the action is that the assessment was illegal and that the illegality can only be made to appear by extrinsic evidence. If the municipal officers have acted within their jurisdiction in making the assessment complained of, that the evidence makes it appear to be disproportionate does not prove, necessarily, that an erroneous rule was adopted.

"Referring to the evidence in this regard, we find that, whereas the ordinance of the Common Council described, as the portion of the city which was deemed benefited and proper to be assessed for the whole expense of the improvement, the entire first ward and all of a certain described portion of the second ward and required that the reassessment to pay for the improvement should be made by the assessors upon the property described, the facts disclose that the assessors allowed themselves a latitude of authority in excess of that conferred and undertook to make exemptions with respect to the properties within the territory of assessment." * * *

"The plaintiff was justified in coming into a court of equity; there to show the illegal nature of the assessment by extrinsic evidence, and we think that the order appealed from should be affirmed."

That case is also suggestive, in the event that counsel for the City shall, notwithstanding the attitude of the State courts in that regard, argue here, as he did in his brief in the State courts, that the uncontradicted testimony of two witnesses ought not to be deemed sufficient to establish the fact of absence of benefit and thus impeach the return of the assessing officers, because "If such theory were to prevail, the courts would have to vacate every assessment made in the City of New York." The case cited, both as reported at general term (88 Hun, 165–167), and in the Court of Appeals (154 N. Y., 580, 581), shows that the evidence *dehors* the record upon which the Court acted in finding that the assessing board transcended its jurisdiction, consisted solely of the testimony of one assessor, called and sworn as a witness in behalf of the party impeaching the official acts of the assessing board, of which this witness was a member, and had, as such, under oath, participated in the performance of the service, and making of the return, which, by his oath as a witness, was deemed successfully impeached, and judgment was rendered accordingly.

The rule thus recognized as established, and applied generally throughout the State elsewhere than in New York City shows that the relief demanded by petitioners herein was denied not for want of jurisdiction vested by the Constitution in the court, of and concerning this subject matter, but solely because of the supposed validity of the statute provision purporting to inhibit exercise of that jurisdiction as regards assessments imposed within that city.

The rule to the contrary of that here acted upon in this regard is tersely stated by Mr. Chief Justice Chase in the case of *Cowles* vs. *Mercer County*, 7 Wall., 118, 122, as follows:

> "No statute limitation of suability can defeat a jurisdiction given by the Constitution."

The Supreme Court of the State having been given by the State Constitution jurisdiction of the subject matter in question, complainants in and by their petition filed therein invoked exercise by that Court of the jurisdiction thus vested in it.

The rule as to what is requisite for such purpose is cogently expressed by Ranney, *J.*, delivering the opinion of the Supreme Court of Ohio, in the following language:

> "The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected, that such complaint has been actually preferred; and that such person or thing has been properly brought before the tribunal, to answer the charge therein contained. When these appear, the jurisdiction has attached; the right to hear and determine is perfect."
>
> *Sheldon vs. Newton*, 3 Ohio St., 494, 499.

The Court was given, by the organic law which created it, jurisdiction of and capacity to entertain the complaint against the person or the body corporate sought to be affected; such complaint was preferred, alleging infirmities in the assessment proceeding rendering them invalid, and such infirmities as were by their very nature foreign to the facts to be officially recorded, could only be made to appear by evidence outside of the record, and praying proper relief against them; and, the parties in interest were properly brought before the Court to answer that charge. Manifestly the ground upon which the Court denied relief was that it held valid the legislative enactment, purporting to take from the Court the jurisdiction which the State constitution had vested in it. As thus decided upon and adjudged, the statutory provisions complained of operate

to deprive plaintiff of its property "without due process of law" and contrary to "the law of the land," by depriving it of the attributes and qualities which constitute the value of the property.

The difference is of form and not of substance, between the imperial *fiat* which of its own force at once wholly confiscates, and the assessment which, confessedly invalid, but upon its face apparently valid, constitutes a subsisting lien of which the owner may never in anywise rid it, and which the assessing power may eventually enforce with interest and penalties, by simply waiting until witnesses shall no longer be found who can testify to the facts rendering the assessment invalid.

FOURTH POINT.

Protection or remedy available only when the pretented assessment is sought to be enforced, coupled with the right of the assessing authority to hold the apparent lien thereof, delay enforcement until and execute it when testimony to prove its invalidity has been outlived, is not adequate protection or remedy.

The case presents plainly the fact that the refusal of the State Courts to exercise the jurisdiction invoked and grant the relief demanded was not by reason of either lack of proof of the facts alleged or of any failure or supposed failure of the State Constitution, the source of the authority and powers of those courts, to vest and continue in them the jurisdiction which plaintiffs invoked exercise of in their behalf.

The opinion of the Appellate Division, announced by Hon. McLaughlin, *J.*, contains, among other, the following:

> "The petitioners contended, in the court below, as they did upon this appeal, that their property upon which the assessments were levied is held and used solely for railroad purposes; that there are no buildings or improvements upon it, except railroad structures; and that it is not, and will not be benefited by the improvements, and therefore, the assessments are illegal. The conclusion at which we have arrived, renders it unnecessary to determine whether the petitioners' property is, or will be, in fact benefited by the improvements, for if that fact be conceded, it does not in and of itself entitle them to have the assessments vacated." * * * *

"It is not claimed that the assessments should be set aside on the ground of fraud, but it is insisted that 'substantial error' was committed; that, the improvements being of no benefit whatever to the petitioners' property, there was no basis for the assessments, and no authority under the statute to impose the same. On the other hand, the respondent contends that, under Sec. 962 of the charter, the court has no power to vacate an assessment for local improvements. Sec. 962 reads as follows: 'No court shall vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property for any local improvement otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents, by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value or fair cost of any local improvement, with interest at the rate of three per centum per annum from the date of confirmation to the final order of reduction, and seven per centum thereafter, be disturbed for any cause. The provisions of this section shall apply to actions to recover money paid for assessments and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement.' These two sections of the Charter are somewhat inconsistent, and in some respects, repugnant to each other; but, in order to ascertain the legislative intent, they must be read and construed together, and when this is done, it seems to us clear that the purpose of the two sections, and the object sought to be accomplished by them, was to deprive the court of the power, 'in any event,' to vacate an assessment for local improvements. To hold otherwise, the plain meaning of Sec. 962 must be disregarded, and the following words eliminated therefrom: 'No court shall vacate * * * any assessment in fact or apparent, whether void or voidable, on any property for any local improvement.'" * * * * * * * The amendment does not validate an illegal assessment, but it does narrow a special remedy so that it no longer covers that particular wrong, and remits the injured party to the ordinary remedies of the citizen generally, except that a bill in equity to vacate the assessment or to remove it as a cloud on title is forbidden (Laws of 1882, chap. 410, paragraph 897). The property owner may still challenge the validity of the assessment whenever his property is seized under it, or it is made the foundation of proceedings against him. It is again urged that the amendment was intended to reach, and must be con-

strued to cover, only cases of irregularity or fraud in which an original authority to make the assessment existed, and not to those in which there was no such authority. The language of the section does not permit such a construction" (p. 42).

This judgment was affirmed by the Court of Appeals "on opinion below" (p. 56).

The result is the conclusive exclusion of every possible inference other than that the refusal of the State courts to exercise their invoked jurisdiction and award the demanded remedy, was, as the Court avowed, solely by reason of and in obedience to the supposed authoritative mandate of this legislative enactment purporting to forbid the exercise of any jurisdiction, and the granting of any remedy in the like premises; and, that the judgment against plaintiffs on the merits, resulted from the State Courts holding and enforcing as valid the legislative enactment, the purport whereof was to inhibit the granting of any remedy for the protection of plaintiffs' property rights of holding and disposing of their property free of any cloud thereon for and during such indefinite period of time as the City of New York might defer attempt to enforce against it a demand known to be unenforceable so long as witnesses are living by whom the facts as to its invalidity might be proven; to the end and effect that finally such confessedly invalid demand may be fully enforced notwithstanding such invalidity thereof, because by lapse of time and death of witnesses plaintiffs will have become deprived of the means of proving the facts showing such invalidity of said demand.

The constitutionality of this enactment as affecting plaintiffs' said property rights was called in question by plaintiffs in and by their objections to said assessments before the Board of Assessors (pp. 35, 36); and, in and by their petition to the Supreme Court (pp. 6, 7); and in and by the evidence by them adduced in support of their said objections and petition (pp. 15, 16, 19, 20, 23); and in and by their briefs submitted at and upon the hearing of said cause in and before the Supreme Court, Appellate Division (pp. 48, 49); and at and upon the hearing of said cause in and before the Court of Appeals (pp. 51–56).

Giving force to the foregoing provisions of the greater New York charter, they operate to lodge upon property an invalid but apparently valid lien for the amount of the assessment, of which the owner is powerless to relieve it otherwise than by submission to its injustice. He may not either pay the money and sue for its recovery upon the ground of the invalidity and injustice of the charge, nor have any proceeding whatsoever to test its validity unless and until the municipality makes sale

of his property, in which event the supposed title of the purchaser claiming under the sale may be resisted.

If, as in the case at bar, proof of the facts showing the invalidity and injustice of the assessment, rests in the knowledge and memory of witnesses, all that is necessary for the municipality to do is to wait until those witnesses have joined the silent majority, and then proceed unhampered to complete the unwarranted subjection of the property to satisfaction of the lien.

This condition of affairs naturally suggests the inquiry of what avail to the land owner is the provision of the Federal Constitution that his property shall not be taken without due process of law, if that shall be deemed due process of law which nevertheless coerces him into payment of an unfounded but colorable charge, by subjecting him to the alternative of either making such payment, or suffering deprivation of the right and power of disposal of his property, for and during such period of time as his adversary may be pleased to defer subjection of the property to payment thereof, with the intent and to the effect of ultimately subjecting the property to payment of such unjust charge by reason of the owner being no longer able to produce witnesses to prove the invalidity thereof.

FIFTH POINT.

"It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision" (*Cohens* v. *Virginia*, 6 Wheaton, 264, 399). **"A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has the force of an official utterance"** (*Colonial, &c., Co.*, v. *Kingston R. R. Co*, 154 N. Y., 495). **Subjection to this test shows the authorities relied upon for the judgment herein failing to afford it support.**

Comment under this point requires a view somewhat in detail of the successive legislative enactments and the adjudications based thereon, whereby the remedy here demanded is

deemed, by the state courts, to have been denied to complainants. Such comment may possibly be somewhat simplified and its appreciation aided by preliminary statement of certain general principles germane to the subject matter thereof, which, although in such degree fundamental and elementary as to dispense with necessity of citation of authorities in support thereof, reflect the light in which these enactments and the state court adjudications based thereon should, as we think, be considered.

1. The making of local improvements and the assessment of all, or a proper and just share, of the cost thereof upon property duly ascertained to be specially benefited thereby, in proportion to such special benefit, is in the nature of a proceeding *in rem*, requiring, as regards notice to the owner, prerequisite to jurisdiction of the subject matter, such notice, actual or constructive, as, while under all ordinary conditions reasonably informs the land owner of the nature of the proceeding, and of his time and place of hearing thereon, is also consonant with the efficient exercise of such power.

2. The legislature acting directly, or the officer, board or tribunal upon whom the power of assessment is delegated, possesses and must exercise that power subject to the jurisdictional limitation that the individual assessment shall not be manifestly and in material degree inequitable, and shall not be in substantial excess of the special benefit evidently resulting to the assessed property from the local improvement, the cost, or a portion whereof, is thus assessed against it.

3. If and in so far as local assessment statutes, or proceedings thereunder, grant, provide or accord to property owners other and further notice, hearing, right or privilege in or incident to, or limitation upon the exercise of, such power of local assessment, these additional rights and limitations are thus granted and accorded as matter of favor only, and not of strict inherent property right; and the statutory provision therefor may, in proper case, be deemed directory merely, and not mandatory.

4. If and so far as statutory provision, or proceeding thereunder, have provided for or accorded to property owners in local assessment proceedings, notices, rights or privileges therein or incident thereto, or limitations upon the exercise of power thereof, of the character of mere favor only, it is competent for the legislature, in and by either previous, concurrent or subsequent enactment, to provide that failure of observance of such provisions of favor merely shall not constitute ground or reason whereon the party thereby aggrieved may ask the courts to vacate or modify the assessment or the apparent lien thereof.

5. Judicial decisions, upholding legislative enactments, to the effect that the lien of local assessments shall continue until the actual payment thereof; that any local assessment shall not be vacated or reduced; that this provision or rule shall apply to and govern actions to recover money paid for assessments; and that no suit or action in the nature of a bill in equity, or otherwise, shall be commenced for the vacation of any assessment or to remove a cloud upon title, in, and as applied to actions where the ground upon which relief is sought is the violation or non-observance of prescribed rights or limitations of mere favor only. do not constitute authority to sustain the same or like legislative enactment where it amounts to denial of remedy for violation or non-observance of fundamental property right expressly protected by the organic law to which the very power of assessment is subject.

In the light of these preliminary observations we proceed to a presentation of the legislation, and judicial decisions thereon, upon which the corporation counsel contended in the State courts, and those learned courts sustained the contention that; conceding the facts to be as claimed by petitioners; conceding that petitioners' property is wholly without benefit from these local improvements; conceding that for that reason the assessments are wholly void; nevertheless, the court is without power to vacate the assessment or to adjudge or hold it void, in this proceeding or in any suit or action in the nature of a bill in equity or otherwise.

The legislative enactments to be here considered are the following, to wit:

1. Chapter 338 of the Laws of 1858, entitled "An Act in relation to frauds in assessments for local improvements in the City of New York."

Sections 1, 2 and 3 of this Act are as follows:

"SECTION 1. If in the proceedings relative to any assessment or assessments for local improvements in the city of New York, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the supreme court, in special term or in vacation, who shall thereupon, upon due notice to the counsel of the corporation of the city in which the lands so assessed are situated, proceed forthwith to hear the proofs and allegations of the parties."

"2. If, upon such hearing, it shall appear that the alleged fraud or irregularity has been committed, the said assessments shall be vacated, and the lien created thereby, or by any subsequent proceedings, shall cease."

"3. On the production of the certificate of the judge,

before whom the proceedings shall be had, that a judgment vacating any assessment has been made by him, it shall be the duty of the officer having charge of the assessment lists to cancel thereon the assessments so vacated, and all proceedings under the same."

It will be seen that this Act provides for a speedy and simple method of review in cases of alleged *fraud* or *legal irregularity;* and, in case they are found to exist, for vacating the assessments. The remedy here provided is not declared to be a substitute for any other existing remedy, nor is it accompanied by any prohibition against pursuing other remedies.

2. Sections 2 and 3 were amended by Chapter 312 of the Laws of 1874, being an act entitled "An Act in relation to taxes and assessment in the city of New York, and the collection and vacation thereof." By this amending act the above sections were made to read as follows:

"1. If, in the proceedings relative to any assessment or assessments for local improvements in the city of New York or in the proceedings to collect the same, any fraud or [legal irregularity] *substantial error* shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the Supreme Court, in Special Term or in vacation, who shall thereupon, upon due notice to the counsel to the corporation of the city in which the lands so assessed are situated, proceed forthwith to hear the proofs and allegations of the parties."

"2. If upon such hearing it shall appear that the alleged fraud or [irregularity] *substantial error* has been committed, the said assessment [s] shall be vacated, and the lien created thereby, or by any subsequent proceedings, shall cease, *and hereafter no suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the act hereby amended.*"

The words omitted are enclosed in brackets; the new words are italicized. The amending act makes no changes except those indicated. A suit or action in the nature of a bill in equity or otherwise is here for the first time prohibited. There was still no prohibition as to the *extent* to which any assessment might be reduced or vacated.

3. Chapter 550 of the Laws of 1880, being an act entitled "An Act relating to certain assessments for local improvements in the City of New York" provided for the general revision of certain assessments. Section 12 of this act is the only one which needs to be specially considered. It would seem,

however, that although this section 12 is general in its terms, it had some special reference to the assessments, special provision for the revision of which is made in the entire act.

Section 12 is as follows:

"12. No existing provision of law shall enable or permit any court to vacate or reduce any assessment in fact or apparent, hereafter confirmed, whether void or voidable, on any property for any local improvement in the City of New York hereafter completed otherwise than to reduce any such assessment to the extent that the same may be shown, by parties complaining thereof, to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause. Nothing in this section shall apply to any assessment which may be imposed for the local improvements known as Morningside Avenue."

This is the first statutory prohibition of any reduction except to the *extent* of increase by reason of the fraud or substantial error.

4. These provisions appear in the Consolidation Act as sections 897, 898, 900 and 903 as follows, this being the first time that all the statutory provisions on this subject were brought together and codified in one act, and here they are brought together under one *title* of such act:

TITLE 3.

Vacating and Modifying Assessments.

"897. No suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under this title." (A part of section 2, Chap. 338, L. 1858, as amended by section 2, Chap. 312, L. 1874.)

"898. If, in the proceedings relative to any assessment or assessments for local improvements, or in the proceedings to collect the same, any fraud or substantial error shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the supreme court, in special term or in vacation, who shall thereupon, upon due notice to the counsel of the corporation, proceed forthwith to hear the proofs and allegations of the parties. If, upon such hearing, it shall appear that the alleged fraud or substantial error, other than such errors as are specified

in the next section, has been committed as provided in this title, the said assessment shall be vacated or modified, and the lien created thereby, or by any subsequent proceedings, shall cease. If, upon such hearing, it shall appear that, by reason of any alleged irregularity, the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party may be modified by deducting therefrom such sum, as is in the same proportion to such assessment as is the whole amount of such unlawful increase to the whole amount of the expense of such local improvement." (A part of section 1 and a part of section 2, of Chap. 338, L. 1858, as amended by Chap. 312, L. 1874.)

"900. Any order vacating said assessments shall be entered in the office of the clerk of the supreme court, and on filing a certified copy thereof with the officer having charge of the assessment lists, it shall be the duty of said officer to cancel thereon the assessments so vacated, and all proceedings under the same; and the justice who shall have made such order may enforce the same, either by attachment for contempt or by writ of mandamus, or both, against any party refusing to obey the same, with costs."

Section 902 limited the application of Sections 898 to 901, inclusive, to certain proceedings.

"903. No *Court* [existing provision of law shall enable or permit any court to] shall vacate or reduce any assessment in fact or apparent, [hereafter] confirmed *after June ninth, eighteen hundred and eighty*, whether void or voidable, on any property for any local improvement [in the City of New York] hereafter completed otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof, to have been, in fact, increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause. Nothing in this section shall apply to any assessment which may be imposed for the local improvement known as Morningside avenue" *s*.

Omitted words in brackets, new in italics.

This section, 903, was so amended by chapter 613 of the laws of 1895 as to read as follows:

"Section 903. No court shall vacate or reduce any assessment in fact or apparent confirmed after June ninth, eighteen hundred and eighty, whether void or voidable, on any property for any local improvement thereafter

completed otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest at the rate of three per cent. per annum from the date of confirmation to the date of the final order of reduction and seven per cent. thereafter be disturbed for any cause. Nothing in this section shall apply to any assessment which may be imposed for the local improvement known as Morningside avenue; nor to any assessment laid in violation of the provisions of sections six hundred and seventy-two, eight hundred and seventy and eight hundred and seventy-five of this act, nor to any assessment laid for an improvement which is not by law the subject of local assessment. Provided neverheless:

1. In case the principle of apportionment of an assessment be erroneous, the court shall reduce the assessment on the lots of the petitioner aggrieved thereby to the lawful and just amount that ought to have been assessed thereon, or in its discretion, the court may set aside and annul the entire assessment and the record thereof and direct the assessment list to be returned to the board of assessors for reapportionment according to law.

2. In case any item or items forming part of the sum assessed be not by law the subject of assessment locally, the assessment shall be reduced to the amount lawfully assessable locally.

3. In case an assessment upon any lot exceeds one-half of the valuation of such lot made by the commissioner of taxes for the purpose of taxation, the court shall reduce the assessment on such lot to one-half of the tax valuation confirmed next previous to the completion of the improvement for which the assessment is laid."

5. These provisions are now found in sections 958, 959 and 962, Title 3 of Chapter XVII. of the charter, relating to taxes and assessments. It is not now necessary to notice the other sections of the Title, but the intent to codify and include in this title all the remedies and the procedure for reviewing local assessments is still further apparent. The Title is headed, and the three sections read as follows:

"TITLE 3.

Vacating and modifying Assessments *for local improvement Other than Those Confirmed by a Court of Record.*

Remedies Limited.

"Section 958. No suit or action in the nature of a bill

in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under this title."

This is Section 897 of the Consolidation Act without any change.

"Petition to the Supreme Court in Case of Fraud or Substantial Error."

"Section 959. If in the proceedings relative to any assessment or assessments for local improvements, or in the proceedings to collect the same, any fraud or substantial error shall be alleged to have been committed, the party aggrieved thereby may apply to a justice of the supreme court in special term or in vacation, who shall thereupon, upon due notice to the corporation counsel, proceed forthwith to hear the proofs and allegations of the parties. If, upon such hearing, it shall appear that the alleged fraud or substantial error, other than such errors as are specified in the next section has been committed as provided in this title, the said assessment shall be vacated or modified, and the lien created thereby, or by any subsequent proceedings, shall cease. If, upon such hearing, it shall appear that, by reason of any alleged irregularity, the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party may be modified by deducting therefrom such sum, as is in the same proportion to such assessment as is the whole amount of such unlawful increase to the whole amount of the expense of such local improvement. Any order that may be made by a justice under authority of this section shall be filed in the office of the county clerk of the county in which the lands are situated, and after the filing of a certified copy thereof with the officer having charge of the assessment, it shall be his duty to cancel or reduce the assessment as required by the order, or do any other act required thereby."

The foregoing section combines the provisions of Sections 898 and 900 of the Consolidation Act without material change, except to conform to the new conditions under the Charter.

Section 903 of the Consolidation Act, as amended, appears as Section 962 of the Charter as follows:

"Power of Court to vacate or Reduce Assessments Limited and Qualified.

"962. No court shall vacate or reduce any assessment in fact or apparent [confirmed after June ninth, eighteen hundred and eighty], whether void or voidable, or any

property for any local improvement [hereafter completed] otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment, which is equivalent to the fair value *or fair cost* of any *actual* local improvement, with interest *at the rate of three per centum* from the date of confirmation *to the date of the final order of reduction, and seven per centum thereafter*, be disturbed for any cause. [Nothing in this section shall apply to any assessment which may be imposed for the local improvement known as Morningside avenues]. *The provisions of this section shall apply to actions to recover money paid for assessments, and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement.*"

Omitted words in brackets, new in italics.

It is to be observed that this section and the other sections quoted from the Charter omit the provisions contained in the sections of the Consolidation Act restricting the application of these sections to certain proceedings; and secondly, that this section extends the restrictive provisions to actions to recover money paid for assessments.

Section 1614 of this charter provides:

"Section 1614. No right or remedy of any character shall be lost or impaired or affected by reason of this act. This act shall not affect or impair any act done or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to the time when this act takes effect or by virtue of any laws repealed or modified by this act, but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if this act had not been passed or said laws had not been repealed or modified," &c.

The cases cited by the Corporation Counsel, and some thereof also by the Court, as supposedly supporting the doctrine upon which the judgment here in question is founded, were the following:

The case, *Matter of Smith*, at Special Term, is reported in 67 How. Pr. Rep., at page 501, and a foot note (page 502) recites that it was "affirmed by general term, November, 1884, on foregoing opinion, no opinion being written by General Term." Its report for the Court of Appeals appears in 99 N. Y., page 424. The only ground of application for relief appears to have been that "the ordinance for the pavement in question was passed without authority of law (67 How. Pr., 502)," in

that "there was no petition by the property owners for the additional course" of flag stones "for which the assessment was made" (99 N. Y., 424). The Special Term, Lawrence, *J.*, says:

"I cannot distinguish this case from that of *Isabella Garvey* (77 N. Y., 523), but under the act, chapter 550 of the Laws of 1880, it would seem that the court is precluded from vacating the assessment; nor can I reduce the amount, because there is nothing by which I can determine the extent to which the assessment has been increased by reason of the fraud or substantial error. (*See decision of Court of Appeals in Matter of Mead*, 74 N. Y., 216.)" * * * "If the ordinance for the pavement in question was passed without authority of law, the execution of the work could have been prevented by appropriate application to the court. Not having availed himself of his legal rights in that respect, I think the petitioner is precluded by section 903 from asking to have the assessment vacated." * * * *

The opinion of Finch, *J.*, writing for the Court of Appeals, is as follows:

"The additional width of sidewalk for which the assessment was laid was a re-pavement within the construction heretofore adopted. (*In re Garvey*, 77 N. Y., 523.) That the existing width was left undisturbed, and a new strip added, making the flagging eight feet wide instead of four, as originally laid, does not alter the result. The sidewalk had been once paved upon a plan and of a width at the time deemed suitable, and that act exhausted the authority given, and left any new paving of the same walk to be governed by the statute which required as a condition precedent a petition of a majority of the property owners along the line of the improvement. (Laws of 1882, Chap. 410, Sec. 875.) The decision in *The Matter of Grube* (81 N. Y., 139) did not hold the contrary. There, the roadway had never been paved at all, on any plan or of any width, and the ruling was that there was no re-pavement of the roadway because the sidewalks had been flagged.

It follows that there was no authority for this assessment since the property owners rested contented with the pavement as originally laid, and made no petition for a change, or for the additional width, and the petitioner would be entitled to have the assessment vacated but for another and peremptory enactment which forbids.

The petitioner is pursuing his remedy under the provisions of the act of 1858 (Chap. 338) and its amendments. That is a special remedy. It was given in addition to and in excess of the usual and ordinary remedies of the citizen

in repelling an unlawful levy and resisting an illegal claim. It was speedy and summary; confined to one locality; and designed to remedy evils peculiar to that locality. It was a remedy which the legislature might give or refuse; and having given, might modify or limit at its pleasure. Originally very broad and covering a large class of cases, it was at a later period very much narrowed and restricted. (Laws of 1880, Chap. 550, Sec. 12.) That restriction took the form of a positive prohibition. It forbade any interference with the assessments through the operation of the special remedy as to all such confirmed after June 9, 1880, for any improvement completed after the date of the enactment, and whether such assessments were 'in fact or apparent,' 'void or avoidable,' except that they might be reduced to the fair value of the actual improvement made. For all assessments back of June, 1880, the special remedy remained unchanged, but from that time forward its sole possible application was to cases where the complaint could be redressed by reducing the assessment to the level of the just value of the improvement.

It is argued that this amendment did not repeal and was not intended to repeal the act which forbids a repavement without the consent of a majority of the property owners adjoining. That is true, undoubtedly. The amendment does not validate an illegal assessment; but it does narrow a special remedy so that it no longer covers that particular wrong, and remits the injured party to the ordinary remedies of the citizens generally, except that a bill in equity to vacate the assessment or remove it as a cloud on title is forbidden. (Laws of 1882, Chap. 410, Sec. 897.) The property owner may still challenge the validity of the assessment whenever his property is seized under it, or it is made the foundation of proceedings against him.

It is again argued that the amendment was intended to reach and must be construed to cover only cases of irregularity or fraud, in which an original authority to make the assessment existed, and not those in which there was no such authority. The language of the section does not permit such a construction. When it describes the assessments to which it applies not only as existing 'in fact,' but as merely 'apparent,' and not only as 'voidable,' but as 'void,' it carefully shuts the door upon any such limited construction; and lest the meaning should even then be doubtful, it adds that 'in no event shall that proportion of any such assessment, which is equivalent to the fair value of any actual local improvement with interest from the date of confirmation, be disturbed for any cause.'

The emergency which led to the act of 1858 is well understood. It was deemed to be of an exceptional nature, and for which a new and summary remedy was needed. The applications to vacate became numerous and crowded the appropriate tribunals. In 1880 when the restrictive amendment was adopted, a local tribunal was established (Secs. 906, 907, 908, 909, 910, 911), empowered wherever substantial injustice had been done by assessments confirmed before June of that year to revise, modify or vacate the same; the evident purpose being to mainly concentrate in the local tribunal the class of litigation provided for, and leave the special remedy confided to the court narrowed to the single case of assessments exceeding the honest and just value of the improvement.

The courts below were, therefore, right in determining that the special remedy invoked by the petitioner had no application to the case which he presented."

Matter of Mead, 74 N. Y., 216, arose in Brooklyn under a statute similar to the one now in the Greater New York Charter.

"The assessment in question was for grading and paving a portion of Seventeenth Street in said city. The lots of the petitioner were assessed at at $243.18 each. The value, as estimated by the assessor, was $100 each, and the ground of the application was that the assessors had no authority to assess the lots to more than one-half their value."

The Court of Appeals, Miller, *J.*, writing, says:

"The summary remedy by petition for relief from an assessment is a statutory one, and is, therefore, independent of any relief to which a party may be entitled by an equitable action or by a *certiorari* to review the proceedings in the Supreme Court." * * * * "Practical experience in large cities demonstrates that lots which from their location are inaccessible or unavailable, for any purpose, by reason of being far below the level of the land which surrounds them, or remote from an open public thoroughfare, are often increased very much in value by the opening of a street or by some other useful improvement, and it may well have been the case that the interest of the owners of the lots in question was substantially promoted by a large expenditure of money to make the necessary change, and that they thereby became available for use and correspondingly valuable. So long as the assessed party received an equivalent, the intention evidently was that the assessment should not be disturbed, whether it was strictly irregular or otherwise, or even if

fraud was shown, except to the extent provided by the statute last cited." * * * * * *

"The principle upon which a corporation tax for the improvement of real estate is founded is quite familiar and well understood. It is based upon the theory that the owner of the property assessed is to receive a benefit corresponding with the amount assessed, and that this is to be paid to meet the cost and expense of the improvement. It is, therefore, of no consequence what the value of the lots may be, provided the enhanced benefit is equal to the assessment. It is not made apparent from the record before us that there has been any departure from this principle, so as to affect the assessment within the enactment in question. Nor is there any ambiguity in the provision cited which indicates a departure from this doctrine."

Matter of Brainerd, 51 Hun, 380, affirmed without opinion, 117 N. Y., 623, is thus stated by Van Brunt, *P. J.*, writing for the General Term:

"The ground upon which it is sought to set aside this assessment is that the sewer was constructed without lawful authority, and that the assessment, therefore, is illegal and void, and that the petitioner is entitled to have it vacated of record. Mr. Justice Lawrence, who heard the motion in the Court below, clearly shows by his opinion that no such relief can be granted in this proceeding, and the views expressed in such opinion we adopt. That he arrived at the correct conclusion is evidenced by the decision of the Court of Appeals in the *Matter of Smith* (99 N. Y., 424), in a proceeding because there was no authority for the doing of the work for which the assessment was levied."

After quoting at length from the opinion in *Matter of Smith*, the learned Judge concludes:

"The ground upon which the assessment in the case at bar is sought to be set aside is precisely of the same character as that in the case cited; and under the principles laid down in that case in conformity with the statute, the appellant cannot avail himself of the peculiar facilities afforded by this statute."

In the case, *Matter of Chesbrough*, 44 N. Y. St. Rep., 586, the only ground of complaint was alleged error in the apportionment of the cost of the improvement, (a local sewer), whereby complainant's property was assessed in a relatively larger proportionate sum than other benefited property. It was not alleged that complainant's assessment exceeded the benefit resulting to his property from the improvement.

The holding of the Court was that it had no power under the

statute to direct re-distribution of the cost of the improvement on the property assessed.

Matter of Feust, 121 N. Y., 299, which was an assessment for regulating, grading, &c., Morris Avenue from 138th Street to 156th Street. The contract was let January 29, 1883, and completed December 6, 1883, and the assessment was made after Section 903 was enacted. The error or irregularity complained of was that the bid for the work was not preceded by proper estimate of quantity, and without distinction between rock and earth excavation, and that the excavation was very largely dirt, but was charged at a rate double the fair value for excavating rock, and it was shown how much the assessment exceeded in dollars and cents, by reason of this error or irregularity, the fair value of the work, and to the extent of that excess the assessment was reduced by the trial court, and that reduction was confirmed by the general term, and affirmed by the Court of Appeals.

In the *Matter of Cullen*, 53 Hun, 534, which was for the improvement of First Avenue, the assessment was confirmed July 20, 1885, and there was a serious error in the manner in which the contract had been relet, the first contractor having failed to complete his work, although he had received some portion of pay for the work. It was shown how much the assessment exceeded, by reason of this fraud or irregularity, the fair value of the work, and the assessment to the extent of that excess was reduced.

In the case of *Lennon* vs. *Mayor, etc.*, 55 N. Y., 361, the ground of the complaint was that the ordinance by and under which the assessment was imposed was not published and advertised previously, according to the charter of 1857. It did not appear but that complainant's property was benefited by the local improvement to the full amount of the assessment charged against him, nor that the expense of the improvement, or of his assessment therefor, had either thereof been in any measure increased by the errors complained of. The omissions complained of were of such matters of form in the method of procedure as the Legislature need not have provided for in the first instance, and so the only question before the Court was whether the Legislature properly might, as it did, provide that their omission should not be ground for invalidating the assessment. This was what the Court was called upon to, and did, pass upon, and the case is authority upon the question thus presented and decided.

In the case entitled *Matter of West*, reported in New York *Law Journal* of November 22, 1898, Vol. XX., No. 43, page 558, the assessment had been laid upon petitioner's property for his proportionate share of the full expense of constructing a sewer, which he claimed and the Court found, was con-

structed in pursuance of a statute by the provisions whereof only one-half of that proportionate share should have been imposed as a special assessment. Complainant sought to have a reduction of the assessment upon that ground, but was held not entitled to relief in that proceeding. For aught that appeared in the case the benefit resulting to his property from the improvement was fully equivalent to the amount of the assessment, and for that reason he was unable to bring himself within the provision of the statute regulating the proceeding prosecuted by him.

Tripler vs. *Mayor*, 125 N. Y.,617, and 139 N. Y., 1, was an action to have an assessment declared void and to recover back money paid on account thereof. The alleged infirmity in the assessment was that the work of the local improvement for which the assessment was laid, was done by day's work, and not by contract, without the requisite authorization by a three-fourths vote of the common council (125 N. Y., 623, and 139 N. Y., 3). The work was commenced in 1873, the assessment confirmed May 24, 1881, notice thereof published May 28, 1881, requiring

> "payment thereof on or before July 27, 1881, and stated that in default thereof interest would be added at the rate of seven per cent from the date of confirmation. The demand of payment required by statute was simply a published notice requiring the amount to be paid to the proper officer within sixty days, or the assessment would bear interest as stated.
>
> The plaintiff did not comply with the demand, and the city took no steps towards enforcing the payment of this assessment from that time forward.
>
> On the 29th of January, 1887, or nearly six years after the confirmation of the assessment, the city still remaining passive as to enforcing the same, the amount of the assessment laid on the plaintiff's land, together with interest, was paid to the clerk of arrears by the attorney for the person to whom the plaintiff herein had sold the property, out of the consideration money reserved for that purpose by the purchaser, and such payment was so paid to free and clear the premises from the lien and encumbrance of the assessment in accordance with the terms of sale and the deed from the plaintiff to the purchaser. This is the finding of the court as to the manner of payment and the person who made it."

Judgment in plaintiff's favor was upon the first review reversed because payment appeared to have been voluntary, and lack of knowledge of the facts invalidating the assessment had not been proven (125 N. Y., 625). The judgment in favor of defendant was reversed upon the second review, because it was

based upon a verdict directed by the court, and the reviewing court deemed the evidence upon this point of want of knowledge sufficient to entitle plaintiff to have it submitted to the jury (139 N. Y., 4).

The reason assigned, upon the first review of this *Tripler* case is interesting in its recognition of the right of the aggrieved party to resort to equity, to wit:

> "He has the right at once to commence his action to set aside the apparent lien of the assessment as a cloud upon his title, and to enjoin its collection, and he may do this before any step is taken toward enforcing the assessment. With such knowledge and with such right, if a person choose, nevertheless voluntarily to pay, it is no hardship to hold he cannot recover it back. In such case no reason exists for permitting him to pay it with full knowledge that the assessment is utterly void, and in the absence of any attempt on the part of the city to enforce payment, and in then allowing him to sustain such an action as this to recover back the money so paid. If the owner of the judgment, or the city, in case of the assessment, sought to enforce payment, the party might pay, even with knowledge, and still recover back. But one against whom a judgment is rendered, or upon whose land an assessment is laid, apparently valid, although in truth utterly void by reason of facts outside of the record, who pays it with full knowledge of those facts and without the slightest attempt to enforce payment of either the judgment or assessment cannot, in any just view of the case, be regarded as making an involuntary payment by coercion in law. If the judgment be so far valid as that it cannot be set aside in any other fashion than by a reversal for error, it is not within the principle I have stated. The facts must be outside of the record and must be of such a character as to render the judgment or assessment void."

If and so far as it appears or may be supposed that the complaints in these cases or any thereof wherein relief was denied were of sufficient scope to present a case for equitable relief, and invoked equitable relief thereon, it does not appear to have been alleged or proven in any one of them that the assessment appeared upon the face of the proceedings valid, and was by evidence *aliunde* shown to be in fact void, because not within the jurisdiction of the assessing power by reason of the fact that the assessed property was not and could not be in any respect or degree specially benefited by the local improvement, for the cost or share of the cost of which the assessment was imposed.

On the contrary, in each case, the infirmity relied upon for attack upon the assessment consisted of either a defect apparent

upon the face of the proceedings, or violation or non-observance of some one or more of the orderly steps in the proceeding, or of some limitation upon the right or authority thereof, which the legislature had prescribed as and in the way of mere favor only, not involving any fundamental jurisdictional right.

These cases and the defects therein respectively relied upon may be briefly summarized as follows: *Matter of Smith*, and *Matter of Brainerd*, no petition of property owners preliminary to the ordinance inaugurating the improvement. *Matter of Mead*, assessment exceeded fifty per centum of value at which the assessed premises were valued for the purposes of general taxation. *Matter of Chesbrough*, error in apportionment whereby complainants' assessment was larger in proportion to benefit than that imposed on certain other benefited property. *Matter of Finch*, and *Matter of Cullen*, cost of work excessive, measure of excess proven and assessments adjudged reduced. *Lennon* vs. *Mayor*, ordinance not published as charter provision required. *Matter of West*, assessment was complainants' proportionate share of total cost of improvement whereas statute provided but half the cost thereof should be raised by special assessment. *Tripler* vs. *Mayor*, improvement work was done by day's work, instead of by contract, without requisite authorization by three-fourths vote of common council. Assessment voluntarily paid and action to recover back held maintainable upon proof of payment without knowledge of alleged defect.

The difference, as regards the point at issue, between the present case and each of those above mentioned, is not only clearly apparent, but also fundamentally important and substantial.

Without referring in detail to the general expressions, argumentative and otherwise, contained in the respective opinions in these several cases, any whereof would purport to furnish or constitute a rule to govern the case here presented, it would seem to be sufficient to say of such expression that it clearly was and could not be otherwise than such a manifest wandering from the very point to be decided, as deprives it of the force of an official utterance, and while such an expression as may be respected, ought not to control the judgment in this subsequent case, where the very point is presented for decision.

In this connection it may also be mentioned that the cases of *Spencer* vs. *Merchant*, 100 N. Y., 585, affirmed by this court, 125 U. S., 345, and *Tonawanda* vs. *Lyon*, 181 U. S., 389, afford no support for the rule upon which the judgment herein is founded. The point involved and the ruling thereon in *Spencer* vs. *Merchant*, is fully as well as concisely stated in the opinion rendered by Mr. Justice Harlan in *Norwood* vs. *Baker*, 172 U. S., at pages 295, 296, in the language following:

"That case came here upon writ of error to the highest court of New York. It related to an assessment, by legislative enactment, upon certain isolated parcels of land, of a named aggregate amount which remained unpaid of the cost of a street improvement. In reference to the statute, the validity of which was questioned, the court said: 'By the statute of 1881 a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was ordered by the legislature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff. The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment.' Again: 'The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they are entitled.' The point raised in that case—the only point in judgment—was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case."

In *Tonawanda* vs. *Lyon* the trial Court, proceeding upon what it conceived to be the doctrine of *Norwood* vs. *Baker*, 172 U. S., 269, deemed it sufficient impeachment of the assessment in question that it was laid and apportioned in pursuance of and in conformity with a statute prescribing an erroneous rule of assessment or apportionment, even though there was no complaint that by reason of such erroneous rule complainant's assessment was more onerous than it would have been if laid and apportioned in conformity with a correct rule. As against such conception and judgment it was sufficient to say "The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances." (181 U. S., 392.)

In the case *Matter of Munn*, 165 N. Y., 149, it appeared that "the assessment was imposed upon the petitioner and another property-owner on Broadway and eight property-owners on Morris Street, and this assessment was confirmed by the board of revision on the 15th of December, 1897" (*Id.*, 152).

The Court of Appeals, O'Brien, *J.*, writing, at page 153, says:

> "In this case we must first inquire with respect to the particular law under which the petitioner has a right to review the assessment. At the time it was made the law in force was the Consolidation Act. At the time that the petition was filed in the court that act had been repealed by the new charter, which went into effect on the first of January, 1898, but the new charter preserved all rights that existed under the charter which had been repealed. By section 1614 it is provided that no right or remedy of any character shall be lost or impaired, or affected by reason of this act. This act shall not affect or impair any act done or right accruing, accrued or acquired. Any right which a party had under the old charter could be asserted, enforced or prosecuted in the same manner as when the right accrued, except as otherwise specially provided. This saving clause is comprehensive enough to enable the petitioner to review this assessment under the law existing when it was made. His right in that regard is to be found in section 903 of the Consolidation Act, as amended by chapter 613 of the Laws of 1895. * * * * * The power to set aside an assessment altogether and remit the record to the assessors has been conferred in one case only, and that is where it appears that the assessors in making the assessment have proceeded upon or adopted some erroneous principle. In such case the court has power, in the exercise of its discretion, to set aside the whole assessment although but a single property-owner complains. But whether an assessment in any case is based upon an erroneous principle or upon correct principles is a question of law. In this case, as we have seen, the entire assessment was vacated, but it is not claimed that, in making it, the assessors adopted any erroneous legal principle. The most that is claimed is that the assessment was unequal, and, therefore, unjust; but that was a question exclusively for the assessors, subject to review and correction by the board of revision. It would be manifestly impossible for the courts to entertain appeals for the purpose of adjusting questions in regard to the equality of every local assessment. When the board of revision has acted, that question is no longer open,

and so this court has held. (*In re Cruger*, 84 N. Y., 619; *In re Church Street*, 49 Barb., 455; *In re Deering*, 85 N. Y., 1; *People ex rel. Davidson* vs. *Gilon*, 126 N. Y., 147.) Had the assessors imposed the assessment uniformly in proportion to the frontage of each lot when all were not benefited in like proportion, that would have been an *erroneous principle, since all* were not equally benefited. Indeed, such a principle of assessment has been held to be unconstitutional in certain cases by the Supreme Court of the United States. (*Norwood* vs. *Baker*, 172 U. S., 269; *Conde* vs. *City of Schenectady*, 164 N. Y., 258.) A uniform assessment upon all the property-owners in proportion to the assessed value of the property might also be held to be based upon an erroneous principle. There are many other methods which the assessors might have adopted in levying the assessment that might be open to question as involving an erroneous rule, but in this case the rule adopted for the imposition of the assessment was that each property-owner was bound to pay for the expense of the sewer in proportion to the benefits received from its construction. The statute requires the assessors to proceed upon that principle and to distribute the expense of the improvement among the owners and occupants of all the houses and lots intended to be benefited thereby in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire."

It thus becomes obvious that as regards the supposed established rule of denial of remedial right against an assessment levied and based entirely upon an erroneous rule, and which a correct rule would forbid in its entirety, such denial had its legislative inception in the Greater New York charter, taking effect January 1, 1898, and its first judicial enforcement in the present case.

Thus, examination of this course of legislation and judicial decision discloses:

FIRST.—Equity jurisprudence and jurisdiction, including within its cognizance remedial right in cases of character identical with this, as administered in the English courts prior to and during existence of this colony, and, in the courts of the colony prior to and until formation of the state, and those courts and that jurisdiction recognized and continued in and by the first constitution of the state; that general jurisdiction continued in the courts by express provision of each constitution subsequently adopted; that jurisdiction of undiminished scope, including cognizance of cases of the character of this one, still exercised by the courts of the state regarding assessments elsewhere in the state than in the city of New York, and

the state constitution recognized as the source of such jurisdiction.

SECOND.—Until the decision of this case the state courts uniformly and as frequently as occasion therefor arose, announcing and adhering to the fundamental rule that a jurisdiction vested in the courts by the constitution cannot be divested or invocation or exercise thereof restricted by legislative enactment.

THIRD.—Legislation, as that of 1858, extending or affording additional and more summary statutory remedies, as matter of favor it may be conceded, cumulative to and not purporting to exclude previously existing common law or equitable remedies.

FOURTH.—Legislation by successive steps restricting remedies as aforesaid originated by and resting upon statutory provision; and by like successive steps and in increased measure restricting and finally purporting to deny to the courts jurisdiction of each and every of the common law and equitable remedies founded upon entire invalidity of the assessment, save and except only that of establishing invalidity thereof as and when a purchaser may set up claim of title under a sale made to satisfy the assessment.

FIFTH.—Judicial decision sustaining as valid these successive enactments, (1) in cases involving denial of remedies having their origin in legislative enactment; (2) in cases involving denial of common law and equitable remedies, where invocation thereof rested upon alleged invalidity of assessments by reason of non-observance of regulations or transcendence of limitations in matters of favor only, prescription whereof did not, upon the ground of either abstract right or constitutional inhibition, necessarily accompany or enter into provision for a valid assessment.

Opposite counsel have not cited in any previous brief herein, and patient research has not enabled us to find, any previous decision of the state court going the length of the present one in denying jurisdiction to grant equitable relief where the assessment appears valid upon the face of the proceedings, and the relied-upon invalidity thereof, provable only by evidence *aliunde*, is absolute and entire absence of special benefit resulting to the assessed property from the local improvement.

Obviously this case in no wise involves any interference with the established rule or policy of the state relating to local assessments, nor interference with any established rule of decision of the state courts, except as first promulgated and solely established by the judgment herein, regarding the remedial rights to which the state's power of local assessment is subject.

It seems difficult to conceive of an argument supporting the judgment of the state court in this case, based upon supposed

authority of its prior adjudications, which is not at the same time a labored apology for such disregard of constitutional guaranty as this case involves.

The contention upon which this judgment is founded seems to us to go to such length as to carry its own refutation. In its final analysis it means that such rule should be sustained because in New York City local assessments are so numerous, and invasions of private right in the laying thereof so general and inevitable, that exercise of the lawful power of assessment cannot be at all maintained unless in addition to its rightful lien for valid assessment, the city shall also be permitted to harass those unlawfully assessed by denying the right to any adjudication upon the validity of the lien until, upon the city's initiative, the property is subjected to sale, for satisfaction thereof; and the owner thereby in the meantime coerced into payment of the unjust charge, in order to hold or dispose of his property by unincumbered title, or to hold the property subject to the apparent lien until evidence of the facts showing invalidity thereof has been outlived, only to have his challenge of validity, formerly provable, finally fail him.

In other words, that legislature and judiciary have taken cognizance that in the matter of local improvements and assessments therefor these city authorities cannot perform their lawful functions unless they be permitted to therein confiscate with impunity the private property of the citizen unhampered by constitutional guaranties designed to prevent such confiscation; and, hence, that it has become and is an established state policy, to which the courts of the state are finally and effectually committed, that judicial interference with such confiscation shall not be permitted until the city make sale of the property to pay the assessment.

SIXTH POINT.

As surely as there is at all a limit upon the power and jurisdiction to impose special assessment for the cost of local improvement, entire absence of evident special benefit resulting to the assessed property from such improvement constitutes absence of such power and jurisdiction.

Upon the hearing it appeared in evidence that the property was used, and can be used, for railroad purposes alone; that the physical situation was such that there is actually no access to or from the petitioners' property and the avenue improved,

and that the present physical situation has been brought about by contract between the city and these petitioners for the very purpose of preventing access to and from public streets and the railroad property.

It also appeared, not only that petitioners' property is held and used for railroad purposes alone, but that under the charter of The New York and Harlem Railroad Company, it *can be held* for such purposes alone. The provisions of the charter of The New York and Harlem Railroad Company (above quoted) are similar to those of the charter of the Hudson River Railroad Company (the predecessor of the petitioner, The New York Central and Hudson River Railroad Company), which was considered in the case of *The New York Central and Hudson River Railroad Company* vs. *Aldridge*, 135 N. Y., 83. This case is directly in point. The action was for ejectment, the property in litigation being land under water. If the railroad company took title in fee simple absolute like any natural person, and free from any limitations contained in its charter, then its grant of land under water was good and must succeed as against the defendant. The provision of the charter of the Hudson River Railroad Company, Section 9 of Chapter 216 of the Laws of 1846, as amended by Chapter 30 of the Laws of 1848, then under consideration, is as follows:

> "Sec. 9. The said corporation is hereby empowered to purchase, receive and hold, in fee simple, such real estate and other property as may be necessary in accomplishing the objects for which this corporation is granted, and may also receive, hold and take such voluntary grants and donations of real estate and other property as shall be made to the said corporation, to aid in the construction, maintenance and accommodation of said railroad and ways, which real estate, voluntary grants and donations, shall be held and used for those purposes only."

At page 95, Mr. Justice Peckham, writing the opinion, says:

> "If the defendant's grantors by their deeds to the railroad company ceased to occupy the position of owners of the adjoining upland within the meaning of the statute, it would probably follow that the patent to the defendant was illegal. We do not, however, so regard the effect of these conveyances. The company took the lands for the use of its road and for that only. The deeds conveyed the land for that purpose only. At the time when the strip was conveyed to the company it had determined and located its line and the conveyance simply granted that which was included in such location. The company received and holds such land in fee simple by the voluntary grant of the former owners and by the provisions of the statute

it holds such real estate and can use it only for the purposes expressed in its charter—that of the maintenance, construction and accommodation of the railroad. For this purpose only the land can be used, and although the title granted to the company is a fee, yet, as thus burdened and restricted, we think the grantor in conveying the strip did not thereby cease to be the owner of the upland within the meaning of the statute."

Moreover, it has been judicially determined that property used as is the assessed property of the petitioners cannot be benefited by an improvement of the character in question.

The New York and Harlem Railroad Company vs. *The Board of Trustees of the Town of Morrisania*, 7 Hun, 652, is authority for this proposition. This was a proceeding to open a street not far distant from the land assessed in this proceeding. The assessment was levied upon the railroad company's property and was contested by the company. The Court held that the right of way of a railroad could not be assessed, because the right of way was not benefited by the street being opened.

Again, *In the Matter of the Application of the Commissioners of Public Parks*, 47 Hun, 302, which was a proceeding to open this same Vanderbilt Avenue East, in which proceeding the Commissioners imposed an assessment of one dollar upon the railroad company's right of way, to which assessment other property-owners objected, and upon the confirmation of the Commissioners' report, an appeal was taken to the General Term. Mr. Justice Van Brunt, at page 304, writing the opinon of the Court, says:

"The omission to assess for benefit the roadbed of the railroad company in no way operates as an injustice. This land could only be used for the purposes of a railway, and as such, no benefit whatever was derived from the improvement."

The "roadbed" above referred to is the same land upon which the assessments complained of have been imposed. If this roadbed, then at grade, could not be benefited by the opening of the avenue, the regulating and paving of the same avenue certainly cannot benefit the same roadbed, now depressed.

In Allegheny City vs. *Western Pennsylvania R. Co.*, 138 Pa., 382, it was held that

"while the owner of the ordinary lot of ground, whether an individual or corporation, cannot be heard to defend against a municipal assessment for paving for the reason that the law presumes such property is benefited, yet, in the case of the roadbed of a railroad, the presumption of

law is the other way. It is the same at all times and under all circumstances; hence the law declares the absence of benefits."

See also *Philadelphia* vs. *Philadelphia, etc., R. Co.*, 33 Penn., 41; *Junction R. Co. Philadelphia*, 88 *id.*, 424.

State (*Morris & E. R.R. Co.*) vs. *Jersey City*, 36 N. J. Law, 56.

Same vs. *Elizabeth City*, 37 N. J. Law, 330.

Morris & Essex R.R. Co. vs. *Jersey City*, 64 N. J. Law, 148.

It cannot be argued that because of the paving of the street greater access is secured to the station of the railroad, and that, therefore, it is a benefit conferred upon the petitioners' property; that is a benefit that accrues to the general public, and is not a special benefit for which an assessment for a local improvement can be made. See *Chicago, Milwaukee and St. Paul Railroad Company* vs. *Milwaukee*, 89 Wis., 506; 28 Lawyers' Reports, annotated, 249 and 255. The argument that the property is benefited for this reason would hold good of all streets in the locality which in any way converge toward a station on the railroad of the petitioners.

Even if the parcel west of the tracks is not used for and devoted exclusively to railroad purposes, it would not be liable to the assessment for these improvements; it does not abut upon the street being improved; there is no access from Vanderbilt Avenue East to this property, and it is not seen how this property can be benefited in any manner by the improvements. If it did not belong to the railroad company it would not be contended that it would be liable to any assessment, because other property similarly situated bore no assessment whatever. The property in block 2898, west of Park Avenue West and northerthly of 173d Street, is not within the area of assessment, and yet that property is benefited, if at all, as much and to the same extent as that part of the petitioners' property is that lies west of the roadway. This will be seen by an examination of the maps attached to the petition.

The established and uncontradicted fact, then, is that the lands of the petitioners upon which the assessments have been levied have not been, and will not be, and cannot be benefited, in any manner, or to any extent, by the improvement.

Whatever view may be entertained upon the question whether the scope of the holding of this Court in the case of *Norwood* vs. *Baker* (172 U. S., 269) was or was not as broad as dissenting opinions in subsequent cases in this Court have conceived it to be, or upon the question whether the holdings of this Court in those subsequent cases have or have not operated to limit the doctrine of that case, we deem it sufficient for the purposes of

the present case to regard this Court as having in that case found and adjudged that by reason of the erroneous rule of assessment and transcendence of the fundamental power of assessment as these affected complainant, her case "presented considerations of peculiar and extraordinary hardships amounting, in the opinion of a majority of the judges of this Court, to actual confiscation of private property to public use, and (thus) bringing the case fairly within the reach of the Fourteenth Amendment."

Tonawanda vs. *Lyon*, 181 U. S., 392.

In other words, it seems to us sufficient for the purposes of the case at bar to present it upon the hypothesis that as the Court would not entertain jurisdiction to determine the question as an abstract proposition, whether legislative enactments, or proceedings thereunder, were in contravention of the provisions of the Constitution of the United States, unless and until such proposition be made concrete by averment that such statute or proceedings thereunder had been or were threatened to be made prejudicially operative upon complainant's person or property in such wise as violated rights guaranteed to him by the Constitution of the United States, so we assume it incumbent upon one invoking relief in reliance upon a ruling of the Court, that he aver and prove not only the existence of statutory provision, or proceeding thereunder, in the abstract non-conformable to United States Constitution within the ruling relied upon, but also that his person or property have been or are threatened to be by means of such non-conformity operated upon or affected prejudicially in such wise as to constitute violation of the right guaranteed by that Constitution, upon which the relied upon ruling of the Court was founded. The hardship to which complainant in the *Norwood-Baker* case was subjected, and the obvious transcendence of the power of assessment, were evident in the facts constituting foundation of the comment of Mr. Justice Harlan couched in the words following:

> "It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special

assessments upon property in order to meet the expense of public improvements in the vicinity of such property."

The assessment in question in that case was, not one in the aggregate and entirety thereof unjust, but, palpably excessive. The legal effect of that palpable excess being the point to be decided, the opinion states:

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

This is followed by citation of and quotation from numerous judicial opinions and standard text writers amply sustaining the proposition that and the reasons why assessment in substantial excess of evident special benefit transcends the power and jurisdiction of local assessment.

Obviously the very ground upon which this Court granted relief in *Norwood* vs. *Baker* was not merely that the assessment was laid under the supposed authority of an improper rule of assessment, but that the assessment laid in pursuance of such improper rule constituted a charge against complainant's property manifestly and materially in excess of the evident special benefit resulting thereto from the improvement and thereby and to the extent of such excess constituted a taking of her property, under the guise of taxation, for public use without compensation.

And this clearly pointed out ground upon which this Court entertained jurisdiction of that case, and in the exercise of such jurisdiction granted relief therein, is reaffirmed in the case of *French* vs. *Barber Asphalt Paving Company*, 181 U. S., 324, wherein Mr. Justice Shiras, delivering the opinion of the Court, at page 345, says:

> "It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of a majority of the judges of this Court, was the nature and effect of the proceedings in the case of *Norwood* vs. *Baker*."

The statute conferring the power of assessment, under the supposed authority of which the purported assessments *here* in question were laid, concedes this limitation by expressly providing for assessment and apportionment thereof according to respective benefits.

While, however, many cases upon this subject illustrate that assessment may be laid in conformity to a rule altogether

erroneous, and complainants not in any wise suffer prejudice thereby, this case very aptly evinces the proposition that prescribing by statute a perfectly righteous rule to govern the laying of assessments is such a sham as might more appropriately have been omitted when it is accompanied by a concurrent statutory provision by the terms whereof the aggrieved party is deprived of remedy, no matter how egregiously such prescribed rule may have been violated by the assessing board, nor what measure of injustice has resulted to the party affected by such violation of rule.

SEVENTH POINT.

The question whether any evident special benefit does or does not accrue from a local improvement to property assessed for the cost thereof, is one upon which the party deeming himself aggrieved is entitled to the judgment of the courts, and one that cannot be finally and absolutely determined against him by the legislature, or by the officer, board or tribunal upon whom the legislature confers the power of assessment.

This was a question necessarily considered and decided in *Norwood* vs. *Baker*, and upon which this Court, by Mr. Justice Harlan, says:

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessment to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property

abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and, therefore, should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received."

Following the above is a citation of and quotation from numerous cases not all thereof specifically deciding this question, but each thereof necessarily standing upon recognition of this right of the aggrieved party to have the judgment of the court upon the question whether in the particular case in hand, the assessing officers have in such wise transcended their power and jurisdiction that by means thereof the assessment complained of constitutes a taking of complainant's property for public use without compensation.

Transcendence of jurisdiction constituted the foundation of the judgment of this court in *Dewey* vs. *Des Moines*, 173 U. S., 193, wherein Mr. Justice Peckham, delivering the opinion, says:

"This plaintiff was at all times a non-resident of that State, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a non-resident of the State, a personal liability to pay such assessment, is a statute which the State has no power to enact, and which cannot therefore furnish any foundation for a personal claim against such non-resident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a non-resident can exist. The State may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretence proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution."

Judicial decision upon this subject clearly demonstrates the judicial view as being that it is one thing to prescribe that as regards the administration of the power of assessment within

their jurisdiction thereof, the determination and judgment of the assessing officers shall be final, and not subject to review by the courts, and it is quite another and different thing to prescribe that no matter how palpably and monstrously their prescribed jurisdiction may have been transcended, no relief shall be afforded by the courts.

The first makes the assessing officers the final arbiters upon and concerning the matters which the law has indeed committed to them; the latter renders their powers despotic by in advance pronouncing their thereafter to be conceived notions of their powers to constitute the only limit upon their usurpations of power.

The right of the court to refrain from reviewing the judgment of such officers in the exercise of their allotted exclusive functions cannot be more palpable than is its duty to take cognizance of their transcendence or abuse of their allotted and limited powers.

Examination of the existing legislation here in question, as fully set forth under the fifth point of this brief, and the opinion and judgment based thereon in this case, shows denial of remedial right in the court, the allowance whereof, in the state courts of Louisiana, constituted the very reason upon which this court held the proceedings in question to constitute due process of law, in the case of *Davidson* vs. *New Orleans*, 96 U. S. 97. In that case Mr. Justice Miller, delivering the opinion, after quoting the second sentence of section 1 of the Fourteenth Amendment, and commenting upon the extreme difficulty of perspicuously and comprehensively defining what should constitute transcendence of powers within the meaning of that provision, at pages 104, *et seq.*, says:

> "As contributing, to some extent, to this mode of determining what class of cases do not fall within its provisions, we lay down the following proposition, as applicable to the case before us:
>
> That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." * * *
>
> "This proposition covers the present case. Before the assessment could be collected, or become effectual, the

statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

The logic of this suggests at once the converse proposition that had this court found the state legislation and judicial decision thereon working absolute denial of such remedial right it would have held the proceeding as not constituting due process of law.

EIGHTH POINT.

The case here presented is not of the class wherein it is necessary to the jurisdiction of this Court that the complainants shall have directly and specifically set up and claimed a right under the Constitution of the United States.

This subject has been considered and the legal doctrine thereof stated in so many cases that it would evidently be asking a work of supererogation to invite attention of the Court to anything like a general review of the discussions and conclusions set forth in them. Thus viewing the subject matter of this point we deem it sufficient to quote briefly from two comparatively recent cases, their recital of the rule of law in relation thereto.

In *Spencer* vs. *Merchant*, 125 U. S., 345, Mr. Justice Gray, delivering the opinion, at page 532, says:

"The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the Legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the

first section of the Fourteenth Amendment to the Constitution of the United States, as well as of Art. 1, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the Supreme Court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this Court has jurisdiction to review."

In *Water Power Co.* vs. *Street Railway Co.*, 172 U. S., 475, Mr. Justice Brown, delivering the opinion, at pages 487, 488, says:

"To the argument that the Federal right was not 'specially set up and claimed' in the language of Revised Statutes, section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here:

(1) 'Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity;'

(2) 'Where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;' * * *

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."

From among the numerous instances of upholding of the jurisdiction of this court, by liberality of construction, in this respect, in no wise required by the case at bar, the following may be cited:

Jefferson Branch Bank vs. *Skelly*, 1 Black, 436.
Bridge Proprietors vs. *Hoboken*, 1 Wall., 116.
Armstrong vs. *Treas. Athens County*, 16 Pet., 281.
University vs. *People*, 99 U. S., 309.
Fisk vs. *Jefferson Police Jury*, 116 U. S., 131.

This is a case wherein the court may properly look to the opinion of the court for the grounds upon which the case was decided. The opinion is set forth in the case made for appeal in compliance with legal requirements.

"The general rules of practice established under authority of Section 17 of the Code of Civil Procedure are followed in the Court of Appeals in cases not otherwise provided for."

N. Y. Court Rules, 1900, page 9, citing,
Walkill Valley R.R. Co. vs. *Keator*, 101, N.Y., 610.

Rule 41, so established, provides, among other things, as to what shall be included in a case for appeal, that "there shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could be produced. The foregoing papers shall constitute the record in the Appellate Division."

"The rules of courts are made under special statutory authority, and when made have the force and effect of statutes."

Matter of Moore, 108 N. Y., 280.
People ex rel. vs. *Nichols*, 18 Hun, 535.

This opinion of the Appellate Division of the Supreme Court, upon which the Court of Appeals affirmed the order of the lower court, is a proper source of information to this Court as to the questions decided in the State courts. Also the certificates of the presiding Judge of the Appellate Division and of the Court of Appeals respectively, authenticating portions of the printed briefs on behalf of petitioners in those courts respectively, constitute competent authentication of the contentions of petitioners in those courts respecting the constitutionality of the law whereon the judgment of the Court was founded. Such proof is clearly within the principle of, and of more satisfactory character because less liable to possibility of mistake than, the general certificate of the Judge as to the contentions urged before him.

The cases upon these subjects are considered and the doctrine thereof announced in

Murdock vs. *City of Memphis*, 20 Wall., 590, 635.
McManus vs. *O'Sullivan*, 91 U. S., 578, 579.
Gross vs. *Mortgage Co.*, 108 U. S., 477, 485.
Philadelphia Fire Assn. vs. *New York*, 119 U. S., 110, 115.

NINTH POINT.

The judgment herein is violative of the rights guaranteed to petitioners by the Constitution of the United States, and should be reversed.

The questions to be adjudged in this case arise upon facts and circumstances which may be summarized as follows:

1. A strip of land 66 feet wide constituting a railroad right of way and a parcel of land lying westerly of that right of way, both owned by The New York and Harlem Railroad Company in fee but by the terms of its charter acquirable and usable only for railroad purposes:

2. This land and railroad held by The New York Central and Hudson River Railroad Company under lease of date April 1, 1873, having many years to run, and requiring the said lessee to pay all taxes and assessments thereon under penalty of the forfeiture of its lease:

3. A public street, Vanderbilt Avenue East, laid out and established subsequent to the building and operation of the railroad and parallel therewith, the easterly line of the railroad constituting the westerly line of the street:

4. The state courts upon the laying out of this street, in the exercise of their jurisdiction in that behalf duly invoked having adjudged that this railroad property was not benefited by and not subject to assessment for the cost of establishing and opening the street:

5. By subsequent contract between the proper city authorities and the railroad company in pursuance of law, and still in force, the surface of the railroad right of way grounds placed and maintained many feet below the level of the surface of the street and bounded by perpendicular retaining wall and fence with the intent and to the effect of rendering access impossible to and from and between said railroad grounds and said street:

6. That street improved by and under direction of the city authorities (1) by regulating and grading, setting curbstones, flagging and laying cross-walks therein; and (2) by paving thereof; the proceeding, upon the face thereof purporting to assess and apportion upon and against the lots and lands specially benefited, and according to respective benefit, the cost of these improvements, and thus assess against the said railroad lands as their proportionate share of such cost, for the first $4,687.82, and for the second $12,626.72, all upon the face of the record of said proceedings apparently regular and valid and in conformity with the statute in such case made and provided, by further provision whereof the said assessments constitute a perpetual lien until actually paid:

7. Applications to the assessing board to vacate these respective assessments upon the grounds of inequality and injustice of apportionment, and that by reason of the character, condition and necessary use of this assessed property it is not and cannot be in any respect or degree specially benefited by these improvements, and refusal of that board to receive evidence in support of such contention:

8. Petition to the State Supreme Court praying vacation of these assessments upon the grouuds set forth, and evidence, all *dehors* the record, in line with and in support of said petition, establishing (a) by undisputed documentary evidence the title of petitioners in and to the assessed property, the uses thereof to which it is restricted, and the agreement providing for rendering access impossible between said assessed property and said street; (b) by undisputed oral testimony and accompanying surveys and documents, the actual use of the assessed property, the actual condition thereof whereby in pursuance of said agreement access between the assessed property and the improved street is in fact rendered impossible, and that the assessed property is not and cannot be in any respect or degree specially benefited by the improvement for the cost of which the assessments are imposed; (c) by undisputed oral testimony that the laying and so-called apportioning of the assessment of the cost of said improvements were and each thereof was made in obedience to, and in and by the carrying out of, a previously fixed, adopted and promulgated general rule of the assessing board as to area and apportionment of assessment, and, without actual consideration of or determination upon or concerning the relative or respective benefit or measure of benefit in these particular instances resulting to the respective parcels of land within the area to which such fixed rule became in this instance applicable; and, (d) by undisputed oral testimony and concession in open court that the assessing board refused to receive petitioners' evidence of the facts, circumstances and conditions tending to prove that petitioners' said lands were not and could not be in any respect or degree specially benefited by said improvements.

9. Contention of counsel on behalf of the city that the prayer of said petition could not be granted, because the granting thereof or of any relief touching the said assessments unless and until the city makes sale of the assessed property to pay the assessments is prohibited by statute; and, that contention upon that ground sustained by the state courts, resulting in the petition being adjudged dismissed upon its merits, with costs:

10. The jurisdiction, exercise whereof was invoked by this petition, vested in and exercised by the English courts prior to and during the existence of the colony which subsequently

became the State of New York; that jurisdiction vested in and exercised by the courts of the colony by and under authority of English Statutes and Colonial Ordinances; those courts and their said jurisdiction taken cognizance of and continued by and under the first constitution adopted by the state; that jurisdiction continued in the Supreme Court, in which this petition was filed, by express provision of every constitution subsequently adopted, including the one now in force:

11. Almost with absolute uniformity and as often as occasion arose therefor the courts of the state have recognized and adjudged the source of the power and jurisdiction of the Supreme Court, as being the provision of the constitution continuing to it general jurisdiction in law and equity, and that jurisdiction not subject to control or restriction by the legislature:

12. That jurisdiction as regards relief against assessments, valid upon the face of the proceedings but in fact invalid on the ground of want of or transcendence of jurisdiction, and such invalidity thereof provable only by evidence *dehors* the assessment proceeding, always and now exercised by the courts with reference to assessments elsewhere in the state than in New York City, and the constitution recognized as and being the source of that jurisdiction:

13. Legislation regarding the granting of relief by the courts against invalid assessments (1) in 1858 materially enlarging the instance and increasing the facility of such remedy; (2) by successive steps taken from time to time from 1874 to 1897, increasingly restricting such statutory remedy, and also the common law and equity remedies based upon invalidity of assessments within the city of New York, the enactment of the latter date purporting to deny to the courts power to hold void or vacate such invalid assessment until the city shall make sale of the property to pay the assessment, upon which event the land owner is permitted to impeach the title of the purchaser by proving invalidity of the assessment:

14. These successive statutory enactments sustained by the courts in cases where the violation of rule appeared upon the face of the proceedings, and in cases involving denial of remedies having their origin in statutory provision, and in cases involving denial of remedy claim whereof was based upon non-observance of direction or transcendence of limitation, prescribed upon the exercise of the power of assessment, not, upon constitutional grounds, necessary to the validity of the assessment:

15. The judgment of the State courts in the present case, upon the supposed authority of such lines of judicial decision, going for the first time to the length of sustaining the validity

of such statutory denial of remedy as regards assessments upon the face of the proceedings valid, by evidence *dehors* the record proven invalid, in that the property of petitioners upon which these assessments are imposed not only is not and cannot be in any respect or degree specially benefited by the local improvements for the cost of which these assessments are laid, but by agreement between the city and the petitioners still in full force, the latter have at their own expense placed, and are required to perpetually maintain their railroad property in such condition as to perpetually and continually prevent access between the same and the said street:

16. By rule of the legislative enactment in this behalf as thus applied and enforced the said assessments constitute, and are to remain of record an apparently perfectly valid lien and charge against this property for and during such time as the city may refrain from subjecting the property to sale for the payment thereof during which time petitioners cannot either have any proceedings legal or equitable to test the validity of said apparent lien, nor make payment thereof, and, by reason of such invalidity of said charge and lien, recover back the sums paid on account thereof.

17. In the meantime both petitioners are deprived of their right of holding and disposing of said property free of incumbrances, and, by the terms of a lease entered into before the adoption of these enactments either preventing payment of such invalid assessment and recovery back of the sum paid on account and by reason of such invalidity thereof, or denying relief in equity by decree vacating such invalid assessment as a cloud upon title, petitioner, The New York Central and Hudson River Railroad Company, is, by reason of such denial of remedy, compelled to either pay, and thereby and altogether and finally lose the amount of said assessments, or subject itself to the hazard of forfeiture of its lease.

18. In the event of the city doing, what, in view of such invalidity of these assessments, provable only by evidence *dehors* the record thereof, it may most reasonably be expected to do in the like premises, viz.: deferring sale of said lands for the payment of said assessments until testimony to prove such invalidity thereof has been outlived, the city may then make sale of said assessed property for the amount of said assessment, with seven per centum per annum interest thereon from the date of the laying thereof, and petitioners be unable to produce evidence, now amply available, whereby to overcome the effect of the presumption of validity of said assessment which the said statute provides shall obtain in favor of and in support of the deed or lease to be executed to the purchaser at and in pursuance of the sale of said assessed property for the said assessments and interest thereon.

The statute, as construed and enforced by the State Courts, and as thus construed and enforced constituting the foundation of the judgment rendered herein, is violative of plaintiffs' property rights guaranteed by the Federal Constitution, and the said judgment should be reversed.

Respectfully submitted,

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Attorney for Petitioners,
Plaintiffs in Error.

THOMAS EMERY,
Of Counsel.

No. 234.

APR 15 1902
JAMES H. McKENNEY,
Clerk

Brf. of Rives & Sterling for D. E.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1901.

Filed Apr. 15, 1902.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY AND ANOTHER,

Plaintiffs-in-Error.

against

THE CITY OF NEW YORK,

Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

GEORGE L. RIVES,
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GEORGE L. STERLING,
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Supreme Court of the United States.

OCTOBER TERM, 1901.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY AND THE NEW YORK AND HARLEM RAILROAD COMPANY, Plaintiffs in Error, *against* THE CITY OF NEW YORK, Defendant in Error.	No. 234.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Statement and Points in behalf of the City of New York by its Corporation Counsel:

In this case it is sought to review in the Supreme Court of the United States, through a writ of error, a decision of the Supreme Court of the State of New York which was affirmed by its Court of Appeals.

The controversy arises in neither a suit at law nor in an action in equity, but in what is called in the statutes of the State of New York a Special Proceed-

ing. And furthermore, it does not arise in one of the ordinary special proceedings, as, for instance, where it is sought to obtain a writ of *mandamus* or a writ of *certiorari* or a writ of *habeas corpus*, but in what we may term an extraordinary special proceeding.

This extraordinary special procedure exists by virtue of certain special statutes of the State of New York applicable to one locality only, to wit, that occupied by the City of New York.

These special local statutes allow or rather require the Supreme Court of that State to review in a summary manner and under certain restrictions and limitations certain classes of assessments for local improvements. The courts whose action it is sought to review here, while courts of general jurisdiction, act under these special local statutes and in this case, only as courts of limited jurisdiction.

The three courts of the State of New York before which this case has been argued have denied the motions made by the plaintiffs in error who were moving parties or petitioners before those courts.

It seems advisable to state the facts somewhat in detail, which we do in the following terms:

The plaintiffs in error are railroad corporations operating a steam railroad in certain parts of the City of New York. The New York and Harlem Railroad Company is the owner of certain lands, franchises and privileges in that city, and the New York Central and and Hudson River Railroad is the lessee of the same, and these two companies have certain contract relations with each other. It is, however, unnecessary to distinguish between them for the purposes of this litigation and we shall therefore speak of them as the Railroad Companies.

A part of these lands consists of a strip of land about four rods wide over which the tracks of the railroad companies are laid and on which numerous trains pass in and out of New York City.

These tracks run in a depressed cut below the natural surface of the ground. This land is owned by the Harlem Railroad Company in fee, having been acquired by purchase from Gouverneur Morris in 1842. The deed therefor was offered in evidence, as appears from page 12 of the record, and from Exhibit 1 at page 24 thereof. The deed is not printed in the record but is apparently an ordinary conveyance without special covenants or conditions.

Another part of these lands is an irregular tract of unimproved property not used for railroad purposes, nor in fact for any purpose at present, and is like any other unimproved land in the vicinity. This land was conveyed to the railroad company by four deeds offered in evidence, as appears at pages 12 and 13 of the record, and which are called Exhibits 2, 3, 4 and 5, at pages 24 and 25 thereof.

All of these deeds are apparently without special covenants, except the one called Exhibit 2, which conveys one parcel and has a covenant as follows:

That the said parcel "shall be used solely and only for the purposes of a railroad and station-house to be thereon erected, and also that no ardent or intoxicating drinks shall be manufactured or bought or sold on the premises to be used as a beverage, and that no dwelling house shall be erected on the said premises of less value than $500, and in case the said conditions are not faithfully performed and kept the estate and the said premises of the grantees or their legal representatives or assigns, or any of them, shall cease and determine and the said premises shall

immediately revert to the grantors, their heirs or assigns, the said premises being also conveyed, subject to all the conditions of fencing contained in the deed from Gouverneur Morris to the parties of the first part hereto."

This clause is not quoted in full in the brief for the plaintiffs in error, and we therefore quote it here.

All of this land unless, possibly, the part as to which the said special covenant relates, could doubtless be sold or alienated by the railroad company and put to any uses to which real estate can be put at any time should the railroad companies so desire, and hence, although some parts of this land are now used for railroad tracks, it may well be in the future that it will cease to be used for those purposes and be sold in the open market like other real estate, and hence will derive the same benefit from local improvements as other land.

Along the side of this cut runs a public street or avenue, called sometimes Vanderbilt avenue and sometimes Park avenue.

In accordance with the laws of the State of New York the City of New York has constructed at its own expense certain improvements of this avenue; has paid for them and has imposed two assessments upon real estate in the vicinity deemed specially benefited by these improvements in order to reimburse itself for the said expenses.

One of these assessments was for the expense of regulating, grading, setting curb-stones, flagging and laying sidewalks in the said avenue, and the other was for the expense of paving the said avenue. Each of these assessments was confirmed on February 17, 1899.

The construction of the avenue, or, as it is called, the regulating and grading thereof, was done at a cost

to the City of New York of $12,236.27 (see p. 27 of the Record).

The paving of the avenue was done at an expense to the City of New York of $26,167.14 (see p. 31 of the Record). All of this expense was distributed over the various parcels of real estate in the vicinity deemed benefited by the improvements, and a part of the expense of each of the said improvements was assessed upon the said land of the railroad companies, to wit:

For regulating and grading.....	$4,687 82
For paving.....	12,542 03

As already stated, a part of the land of the railroad companies is occupied by the depressed cut in which the railroad tracks are laid, and another part is ordinary, vacant land, without buildings or any other structure, lying west of the railroad tracks and entirely unused for any purpose at the present time.

These two parts, however, are assessed together, that is to say, the cut where the railroad track is and also the said large tract, between Wendover avenue and One Hundred and Seventy-third street, west of the cut, are assessed for each improvement under five numbers, but as one parcel, and in one amount in each case, so that it is impossible to tell at the present time at what amount the different subdivisions of the said lands are assessed (see the part colored green on the map reproduced, between pages 10 and 11 of the Record and the assessment on pages 30 and 34).

There is nothing, therefore, in the case to show what amount was assessed upon the land on which are the railroad tracks and what amount upon the other unimproved land.

The process of constructing improvements of this character and levying assessments therefor, may be described as follows:

The first step is the adoption of a resolution by the local legislative body called the Common Council authorizing the improvement, and the doing thereof, at the public expense and the laying of an assessment therefor.

The second step is the making of a contract by the City with a contractor for the construction of the improvement.

The third step is the ascertainment of the cost upon the completion of the work, which cost is embodied in certificates to the Board of Assessors, which determine the amount to be assessed.

The fourth step is the action of the Board of Assessors.

The assessors are local taxing officers of the City appointed by the Mayor for the purpose of "making all assessments other than those required by law to be confirmed by a court of record for local improvements for which assessments may be legally imposed" (see section 943 printed in full in the appendix).

The assessors were five in number when these improvements were before them.

The sixth step is the action of the Board of Revision of Assessments. That Board consisted of the Comptroller, the Corporation Counsel and the President of the Board of Public Improvements, and is in the nature of an appellate tribunal upon decisions of the Board of Assessors (see section 944 printed in full in the appendix).

It has power to consider on the merits all objections made to any such assessment and to subpœna and examine witnesses in relation thereto, and to confirm the assessment or to refer the same back to the Board of Assessors for revisal and correction in such respects as it may determine. All such assessments immediately upon confirmation must be transmitted to the Comptroller for entry and collection.

The course described above was followed as to each of the assessments now before the Court, and they were each confirmed by the Board of Revision, February 17, 1893, and thereupon became charges against the railroad companies, collectible in the usual course if they were legal.

It may be observed here that the railroad companies object to nothing previous to the action of the Assessors. They do not deny that the improvements were duly authorized by the Common Council, nor that they were constructed by contract with the City, nor that the cost was paid by the City, nor that they were constructed in a careful, proper and economical manner, nor do they deny that improvements of this character should under the law be paid for through assessment of property in the vicinity deemed benefited by the improvement, nor in fact that there was anything illegal in the action of the City or of the contractors in making the improvements.

It is important to see just what the railroad companies did object to, as disclosed by the record.

Their first act in opposition to the proposed assessment was to object and protest against the same when is was before the Board of Assessors (see Exhibit 15, at page 35 of the Record).

The material part of their objection was as follows:

"That it is unfair, unequal, inequitable and un-

just and is assessed more than the surrounding property. The property assessed extends beyond the entire western line of the improvement for 4,105 feet and is 66 feet wide. Upon the opposite or westerly side of the property assessed, which is held by the New York and Harlem Railroad Company as owner, and is in the possession of and is used and occupied by the New York Central and Hudson River Railroad Company, as lessee, for the purpose of its incorporation, is Vanderbilt Avenue, West, a public street and thoroughfare, and the property, therefore, is liable to an assessment for improvement for Vanderbilt Avenue, West. It is, therefore, not to be considered as full lot property although the assessment against it is made upon that basis. By virtue of the above premises, it is respectfully submitted that the foregoing assessment should be materially reduced."

The above objection was as to the regulating and grading assessment.

The objection before the Board of Assessors as to the paving assessment was similar (see Exhibit 16, at page 36 of the record). The prayer for relief only, being slightly different, to wit.: That the assessment "should be entirely vacated or materially reduced."

The two proposed assessments with the said objections were transmitted by the Assessors to the Board of Revision (see Exhibits 17 and 18, at page 37 of the record). The latter Board, however, confirmed the assessments (see pages 31 and 35 of the record).

It is thus to be observed that neither before the Board of Assessors nor before the Board of Revision did the railroad companies even claim that they were not liable to be assessed because they were not benefited. Their specific objection has just been quoted

above. They claim that the "assessment is unfair, unequal, inequitable and unjust, and (their land) is assessed more than the surrounding property," and that it was liable to assessment for other improvements in the neighborhood, and not as full-lot property.

This brings us down to the period succeeding the confirmation of the assessment when the amount of the charge or claim by the City against the railroad companies had become fixed.

The railroad companies then appealed to the Court. They adopted the form of procedure prescribed by the New York Statutes (*i. e.*, the Greater New York Charter), which was then Laws of 1897, chapter 358, which is printed as the third volume of the Session Laws of that year.

[See particularly sections 958 to 964 thereof, called Title 3 of chapter XVII. These statutes are printed so far as material in the appendix.]

This procedure is briefly as follows (section 959):

If in the proceedings relative to an assessment for a local improvement, any fraud or substantial error shall be alleged to have been committed, the party aggrieved may apply to a Justice of the Supreme Court in Special Term or vacation who shall thereupon, upon due notice to the Corporation Counsel, proceed forthwith to hear the proofs and allegations of the parties. The Justice is authorized after the hearing to make such order as may be allowed under the statutes; that is, an order reducing or refusing to reduce the assessment, and perhaps in some cases vacating the same.

The railroad companies elected to proceed under the said statutes and filed a petition thereunder which is printed at page 8 of the record. The material part thereof is as follows:

"XII.—And your petitioners further show that

the improvements for which the said assessments have been made, laid or imposed are local improvements, and that in the said proceedings under which the said assessments have been made, laid or imposed substantial errors have been committed, among which are the following:

First—That the said lands owned, occupied and used by your petitioners as aforesaid and upon which said assessments have been made, laid or imposed are not houses and lots within the meaning of the said ordinances and statutes, and that the said lands owned, occupied and used by your petitioners, as aforesaid, have not been, will not be, and cannot be, benefited in any manner by the said improvements.

Second—That there was and is no authority of law for the assessment upon the said lands owned, occupied and used by your petitioners as aforesaid, and upon which said assessments have been made, laid or imposed for the total cost or any part of the cost of the said improvements.

Third—That the cost and expense of the said work in making said improvements have not been distributed equally or in proportion to the benefit upon the houses and lots fronting upon said Vanderbilt avenue, East, and upon all the houses and lots benefited thereby and assessable therefor.

Wherefore, your petitioners pray that the said assessments be vacated and that the lien or liens created thereby, or by any subsequent proceedings cease, so far as the said assessments affect the said lands owned, occupied and used by your petitioners as aforesaid, and that the Collector of Assessments and Arrears, the Clerk of Arrears,

the Comptroller, and the Deputy Comptroller of the City of New York, be each directed to cancel and discharge said assessments and liens, or apparent liens, upon the records in their respective offices, so far as the same affect the said lands of your petitioners.

Dated, Borough of Manhattan, N. Y. City, March 16, 1899."

It will be seen from the above that the substance of the railroads claim before the State Courts was that their lands could not be legally assessed because they were not benefited.

This claim, it will be observed, was not raised before the assessors, and thus the railroad companies have changed their position.

Proceeding under the said statute and to support their petition certain testimony was taken, which is printed in the record between pages 12 and 24, and certain exhibits are also printed, to which it is not necessary to refer here further than to say that they merely tend to show that the assessments are legal.

The only testimony tending to show that the assessments were illegal is that of the two witnesses, Haviland and Van Etten. This testimony is important to the petitioner's case, and in fact that case depends upon their testimony, at least in one view of the subject.

The railroad companies attempted to show by these two witnesses that their land was not benefited by the improvements. These two men are employees of the road: Haviland as a civil engineer and Van Etten as general superintendent. They testified, in substance, that the improvements were of no benefit to the land of the railroad company.

It is, of course, fundamental to the case of the plaintiffs in error that the assessments should be shown to be illegal, and the only ground on which they are now claimed to be illegal by the railroad companies is that the improvements were of no benefit to the railroad companies or to their land. This, it must be admitted, is a question of fact on which there might be a difference of opinion. We do not believe that this Court would hold that as matter of law from the situation disclosed in this case the lands of the railroad companies could not be benefited by the improvements, and do so for the purpose of reversing the action of all the State Courts.

If, then, there is a question of fact as to whether the railroad companies' lands are benefited or not by the improvements then we have this situation. The five Assessors and the three members of the Board of Revision have held in the exercise of their official duties that the railroad companies' lands are benefited by the improvements to the extent of the assessment put upon them. Against their adjudication we have the testimony of two employees of the railroad company that the land is not benefited by the said improvements.

The chief function of the Board of Assessors and the Board of Revision is to determine the very question whether or not a particular piece of property has been benefited by a local improvement and if so to what amount. They are the local tribunals created to pass on that very question. A court of first instance would not, on general principles, interfere with their decisions upon a matter so peculiarly within their province, and an appellate court much less, except upon the clearest and most convincing evidence that there was no benefit.

We are thus brought to this position. There has arisen a question of fact which this Court, if it is to

annul the decisions of the State Courts, must decide in favor of the plaintiffs in error by reversing the judgment of the Assessors and the Board of Revision of Assessments, and the implied finding of the State Courts, and accept the testimony or rather the opinion of the two employees of the railroad.

The situation would then be that any assessment in the City of New York should be vacated, provided two witnesses, even agents or employees of the petitioner, can be got to swear that in their opinion the assessment does not benefit the property.

In the state of the evidence described as above, the case was brought to a hearing at a Special Term of the Supreme Court of the State of New York, the court of first instance, before Mr. Justice Truax, upon the said testimony and exhibits. He denied the motion for a vacation or reduction of the assessments and made an order to that effect which is printed at page 10 of the record. He wrote no opinion and the reasons for his decision do not appear further than from what can be gathered from the record.

The order, however, recites that the motion for the vacation or reduction of the assessments came on for a hearing before Mr. Justice Truax; that upon reading and filing the petition and notice and the testimony, and after hearing counsel on each side, he denied the motion or prayer of the petitioner with costs to the City of New York.

It seems fair to presume that he declined to disturb the finding of the Assessors and Board of Revision that the railroad companies were benefited to the amount of the assessment imposed upon them.

The railroad companies then appealed from the said order to the Appellate Division of the Supreme Court of the State of New York for the First Department.

The Appellate Court, however, affirmed the said order (see the order at page 39 of the record), and the elaborate opinion of that Court by Mr. Justice McLaughlin, may be found at page 40 of the record. The said opinion is also printed in the official reports as *Matter of the Petition of the New York Central and Hudson River Railroad Company*, 49 *App. Div.*, 281.

The following quotation from the opinion of the Appellate Division may be made:

> "The petitioners contended in the Court below, as they did upon this appeal, that their property upon which the assessments were levied is held and used solely for railroad purposes; that there are no buildings or improvements upon it except railroad structures; and that it is not and will not be benefited by the improvements and therefore the assessments are illegal. The conclusion at which we have arrived renders it unneccesary to determine whether the petitioners' property is or will be in fact benefited by the improvements, for if it be conceded that it will not, that does not in and of itself entitle them to have the assessments vacated."

The Court then proceeded to carefully analyze the statute authorizing this particular procedure, and held that in that form of procedure, and on the evidence submitted, the railroad companies were not entitled to an order of vacation or reduction. In doing this the Court simply construed a State statute of a special and local character and held that it did not entitle the petitioners to a vacation or reduction of the assessment on such a state of facts as appeared.

The railroad companies appealed from the order of the said Appellate Court to the Court of Appeals, which latter Court affirmed the decision of the Appellate Court (see mem. in 163 N. Y., 604), and remitted

the case to the Supreme Court of the Sta
York (see remittitur at page 1 of the record).

The railroad companies then secured a writ of error whereby the case comes before the Supreme Court of the United States.

It is evident from the statement of the case, which we have just made, that the record of what was done before the Assessors and the Board of Revision and before the State Courts does not disclose any Federal question whatever. Nor is there a word in the opinion to show that a question of Federal or State constitutional law was raised, or discussed, or decided. The gist of the complaint before the Assessors was, that the proposed assessments should be greatly reduced for certain technical reasons.

The claim and argument before the courts was that the railroad companies' land was not benefited and hence that the assessments should be vacated.

The Appellate Division and Court of Appeals, held that whether the said lands were benefited or not the Court could not, under the restrictions of the statutes applying to this form of procedure, vacate the assessments. They did not hold that the assessments were legal, nor issue any process upon their decision depriving the railroad companies of their lands, nor could they issue any such process under the law. They merely decided that the petitioners were not entitled under these statutes to a vacation of the assessment, and their motion for that relief in the form of procedure adopted should be denied. The petitioners are therefore left just where they were before, just where they would be if the whole law under which they proceeded were repealed, as it might legally be at any time by the State Legislature.

The railroad companies claimed that under a proper construction of these special statutes, the Court should vacate the assessments because the improvements did not benefit their property. The two Appellate Courts held that properly construed the statutes did not allow the Court to vacate or reduce the assessments and hence it was unnecessary to determine whether the property was benefited or not.

But the railroad companies now urge that another statute takes away the remedy by bill in equity to remove the assessment as a cloud upon title (see section 958 printed in full in the Appendix).

Suppose it does; we are not now before the Court in an action in equity to remove a cloud upon title. If the railroad companies had brought such an action in order to remove this assessment as a cloud upon title, and the State Courts had decided that such an action would not lie because forbidden by statute, and such a case came before this Court, a different issue would be presented.

It may be, for aught we know, that this Court would hold that a statute depriving a litigant of this remedy might result in depriving him of his property without due process of law. Whether it would or not is not material here, nor are we bound to uphold one or the other side of this question.

We are before this Court in a special statutory proceeding under State laws in which the highest Court of that State has held that a certain motion for relief should be denied. There is nothing to prevent the railroad companies from bringing now an action in equity to remove the assessment as a cloud upon title in which they may, if they choose, raise the question that the statute depriving them of this remedy is unconstitutional.

Let us now examine how the plaintiffs in error get before this court. They do so in this manner: They have secured a certificate from presiding Justice Van Brunt of the appellate Division of the Supreme Court of the First Department (see page 48 of the record) to the effect that certain statements or arguments therein set forth were contained among others in the printed brief presented and submitted by counsel for the railroad companies to the said Appellate Division on the argument before that court.

They have also obtained a similar certificate from Chief Judge Parker of the Court of Appeals. (See page 50 of the record.)

There is nothing in said statement or argument before the Appellate Division referring to the Federal Constitution. The claim is that statutes which take away all remedy from a person aggrieved are void and unconstitutional and also that assessments imposed for local improvements without regard to benefit are also void and unconstitutional. This is an argument of force in reference to the State Constitution as much as in reference to the Federal Constitution, and it would seem that it was intended to refer to the former. At any rate, not a word is written therein as to the Federal Constitution.

When we turn to the said statement or argument before the Court of Appeals almost the same thing may be said. The only reference to the Federal Constitution is at page 52, where it is stated that such a construction of a statute should be made as "will render it conformable to, rather than violative of, the rule of State and Federal Constitution."

The same two propositions are repeated with more elaboration in the argument before the Court of Appeals, which we have stated as the substance of the

argument before the Appellate Division, to wit: (1) Statutes taking away all remedy against illegal action are void and unconstitutional. (2) Assessments imposed for local improvements without regard to benefit are void and unconstitutional.

On this very slim foundation the railroad companies petitioned this Court for a writ of error (page 58 of record), on the ground that the validity of the State statute was drawn in question as depriving the petitioners of their property rights without due process of law, and the decision being in favor of its validity was repugnant to the Constitution of the United States.

The plaintiffs in error filed certain assignments of error (see page 54 of the record), which are to the effect merely that the decisions of the State courts are erroneous because the statutes of the State as construed by said courts and the authority exercised thereunder result in depriving the railroad companies of their property rights without due process of law, and hence are repugnant to the Constitution of the United States.

It is settled that a petition for a writ of error forms no part of the record upon which the Supreme Court acts (*Leeper* vs. *Texas*, 139 U. S., 462).

The only basis, therefore, for getting before this court at all is certain statements in the brief of the counsel for the railroad companies before the two appellate courts, which statements were not considered, so far as it appears from the record, by the said courts at all, nor were they passed upon by any of the State courts, nor was a decision on those points necessary to the conclusion arrived at by the said courts.

We have determined to present the argument for the defendant in error by (1) repeating substantially the

argument before the State Courts, and (2) by discussing such phases of the subject as it seems to us this Court might consider peculiarly within its province. This course will involve a reference to many matters of detail which this Court will doubtless not pass upon, but it will at least disclose the practical side of the matter. A certain amount of repetition will also result, but we believe the effect will be to make the subject clearer, and enable this court to more easily understand the true situation, which, on account of the technical character of the proceeding, it is not easy to make plain.

It is of vast importance to the City of New York that its system of law as to assessments for local improvements, which has been laboriously built up during a long series of years and at great expense, and after much legislation and litigation, should not be thrown into confusion by unsettling the basis of the system itself.

It will be readily seen, we hope, from our brief that the questions involved are of little importance to the railroad companies, who could not be compelled to pay the assessments if in fact they are illegal, nor could they be even embarrassed seriously by any action the City could take.

It would be a very disastrous thing for the City, however, if its system of dealing with assessments for local improvements should be held unconstitutional.

FIRST POINT.

Under this point we repeat substantially the argument that was made for the City of New York before the State Courts, and particularly before the Court of Appeals.

We make this argument under three subdivisions.

I.

THE RAILROAD COMPANIES HAVE BEEN DEPRIVED BY STATUTE OF ANY REMEDY IN THIS FORM OF PROCEDURE ON THE STATE OF FACTS DISCLOSED BY THE TESTIMONY, SO THAT THE ORDER APPEALED FROM IS CORRECT EVEN IF IT WERE CONCEDED THAT THE IMPROVEMENTS ARE OF NO BENEFIT TO THE SAID COMPANIES.

This has been settled in the State Courts by a long line of decisions, so that, for this reason alone, the order should be affirmed. Each of these assessments was confirmed in the year 1899, and, of course, since the Greater New York Charter went into effect. It has been decided, at Special Term, in at least four cases beside the present one, that have arisen since the Greater New York Charter went into effect, that the above statement of the law on this point is correct.

These cases are as follows:

Matter of *Zimri West*, decided by Mr. Justice Bischoff in December, 1898;

Matter of *Cornelius F. Kingsland*, decided by Mr. Justice Scott two or three months later;

Matter of *Frederick Brooks*, also decided by Mr. Justice Scott shortly afterward;

Matter of *David R. Jaques*, decided by Mr. Justice Andrews May 15, 1900.

The opinion of Judge Bischoff, which also involved other questions, is printed in the New York Law Journal of November 22, 1898, and that of Judge Andrews in said journal of May 16, 1900. In the other cases no opinions were written; and it is, perhaps, fair to say that the question seems to have been regarded in the *Kingsland* and *Brooks* cases as no longer an open one.

And, more important still, there is the decision of the Appellate Division in the case now before this Court (49 App. Div., 281).

The conclusion stated in the first subdivision of our first point is reached in the following way:

Section 962 of the Greater New York Charter, which alone is sufficient to sustain our contention, reads as follows:

"Sec. 962. No court shall vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property for any local improvement otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that portion of any such assessment which is equivalent to the fair value or fair cost of any actual local improvement, with interest at the rate of three per centum per annum from the date of confirmation to the date of the final order of reduction, and seven per centum thereafter, be disturbed for any cause. The provision of this section shall apply to actions to recover money paid for assessments, and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement."

No attempt has been made in the evidence of the petitioners to show that the cost of the work was excessive, or that the portion of the assessment which is

equivalent to the fair value or fair cost of the improvement has been exceeded.

It will be observed that the above provision of law absolutely prohibits the vacation of an assessment for any reason in this form of procedure, and that it can only be reduced, on evidence showing that the cost of the work was fraudulently excessive, to the fair value or fair cost of the work.

This evidence being wanting, there is no basis even for a reduction.

The section quoted above from the Charter is substantially the same, and exactly the same so far as this argument is concerned, as section 903 of the New York City Consolidation Act (Laws of 1882, chap. 410) previous to its amendment by chapter 613 of the Laws of 1895.

This amendment of 1895 remained in force less than three years and is of no importance in the present case.

Section 903 of the Consolidation Act in turn was a re-enactment of section 12 of chapter 550 of the Laws of 1880.

The construction and meaning of this limitation upon the power of the Court to vacate or reduce assessments in this form of procedure has been before the courts for construction in numerous cases and, as we think, has been settled.

One of the principal and earliest cases is *The Matter of Smith*, 99 *New York*, 424.

The wording of the statute then before the Court is identical, in the respects now under consideration, with the present statute.

In that case the improvement for which the assessment had been laid was for the flagging of a sidewalk

and the proceeding was instituted under the same system of law, substantially, as the present proceeding, for the purpose of vacating the assessment.

It was decided in that case that the assessment was illegal and void, for the reason that the sidewalk had previously been flagged and an assessment therefor levied and paid, so that the assessment then under consideration was laid in direct violation of a statute. It was also held that although that was the case and there was no authority at law whatever for laying the assessment, still the Court had been deprived by the said statute of the power to grant any relief in that form of procedure. We cannot do better than quote from the opinion of the Court, written by Judge Finch, the following, which reviews the whole subject:

"The petitioner is pursuing his remedy under the provisions of the Act of 1858 (chap. 338) and its amendments. That is a special remedy. It was given in addition to and in excess of the usual and ordinary remedies of the citizen in repelling an unlawful levy and resisting an illegal claim. It was speedy and summary, confined to one locality, and designed to remedy evils peculiar to that locality. It was a remedy which the Legislature might give or refuse, and, having given, might modify or limit at its pleasure. Originally very broad and covering a large class of cases, it was, at a later period, very much narrowed and restricted (Laws of 1880, chap. 550, sec. 12). That restriction took the form of a positive prohibition. It forbade any interference with assessments through the operation of the special remedy as to all such confirmed after June 9, 1880, for any improvement completed after the date of the enactment, and whether such assessments were 'in fact or apparent,' 'void or voidable,' except that they might be reduced to the fair value of the actual improvement made. For all assessments back of June, 1880, the special remedy

remained unchanged, but from that time forward its sole possible application was to cases where the complaint could be redressed by reducing the assessment to the level of the just value of the improvement.

"It is argued that this amendment did not repeal, and was not intended to repeal, the act which forbids a repavement without the consent of a majority of the property-owners adjoining. That is true, undoubtedly. The amendment does not validate an illegal assessment; but it does narrow a special remedy, so that it no longer covers that particular wrong, and remits the injured party to the ordinary remedies of the citizens generally, except that a bill in equity to vacate the assessment or remove it as a cloud on title is forbidden (Laws of 1882, chap. 410, sec. 897). *The property-owner may still challenge the validity of the assessment whenever his property is seized under it or it is made the foundation of proceedings against him.*

"It is again argued that the amendment was intended to reach and must be construed to cover only cases of irregularity or fraud, in which an original authority to make the assessment existed, and not those in which there was no such authority. The language of the section does not permit such a construction. When it describes the assessments to which it applies not only as existing 'in fact,' but as merely 'apparent,' and not only as 'voidable,' but as 'void,' it carefully shuts the door upon any such limited construction; and lest the meaning should even then be doubtful, it adds that 'in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause.' The emergency which led to the Act of 1858 is well understood. It was deemed to be of an exceptional nature, and for which a new and summary

remedy was needed. The applications to vacate became numerous and crowded the appropriate tribunals. In 1880, when the restrictive amendment was adopted, a local tribunal was established (secs. 906, 907, 908, 909, 910 and 911), empowered, wherever substantial injustice had been done by assessments confirmed before June of that year, to revise, modify or vacate the same; the evident purpose being to mainly concentrate in the local tribunal the class of litigation provided for, and leave the special remedy confided to the Court narrowed to the single case of assessments exceeding the honest and just value of the improvement. The courts below were, therefore, right in determining that the special remedy invoked by the petitioner had no application to the case which he presented."

There have been numerous other cases following this one, and entirely in accord therewith."

See—

Matter of Feust, 121 N. Y., 299.
Matter of Brainerd, 51 Hun., 380; affirmed 117 N. Y., 623.
Matter of Cullen, 53 Hun., 534; affirmed 119 N. Y., 628.

These cases were all decided after the consolidation act went into force, and hence when the law was in the same condition as it is at the present time. They are therefore controlling authorities at the present time equally as before.

The learned counsel for the petitioners made an elaborate attempt before the State courts to show that in the Greater New York Charter a change in the law had been made and the petitioners were entitled now to a vacation of the assessment.

He urged the following:

" The position of the petitioners is that the Charter " has provided a specific method of review under which

" the Court is authorized to wholly vacate and set aside " these assessments ; and that if the Corporation Coun- " sel's construction of the scope and effect of the pro- " visions of the Charter are correct, these provisions " are unconstitutional and void."

The following general answers may be given :

1st. The Charter is substantially the same in the provisions now material as the Consolidation Act was.

2d. The decisions referred to above were made when the law stood substantially the same in these respects as it stands now, so that the said decisions are as much in point under the Charter as they were before its enactment.

3d. It may be true that if the two sections involved stood alone they might not be entirely harmonious, yet, as in many cases of statutory construction, it is necessary to consider the two together, and in order to determine their meaning, it is also necessary to consider their history and origin. When this is done, the apparent inconsistency is explained.

4th. If we were driven to that extremity, we could invoke the well-known principle that the latter section, if inconsistent with the former, would be held to repeal the former and to furnish itself the law.

We understand the point made by the petitioners, put as simply as possible, is this :

It is provided in section 959 of the Charter that the Court may vacate an assessment for fraud or substantial error, while under section 962 the assessment can only be reduced because of fraud or substantial error.

We may concede at once that the wording of these two sections, when read together, is not as clear as

might be desired. The reason, however, why they stand in the form they do and their real meaning will be seen easily from the examination of their history.

We must remember that we are dealing with a special system of laws relating to the vacation and reduction of assessments for local improvements. This system originated with chapter 338 of the Laws of 1858, previous to the enactment of which statute there was no special law upon the subject, and we presume the only way in which a property-owner could then have been relieved of an illegal assessment for a local improvement was through an action in equity in the nature of a bill to remove a cloud upon title.

In order to provide a more expeditious remedy, the said chapter 338 of the Laws of 1858 was enacted. That act was as follows:

"CHAPTER 338.

"AN ACT in relation to frauds in assessments for local improvements in the City of New York.

"Passed April 17, 1858, three-fifths being present.

"*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

"Section 1. If in the proceedings relative to any assessment or assessments for local improvements in the City of New York, or in the proceedings to collect the same, any fraud or legal irregularity shall be alleged to have been committed, the party aggrieved thereby may apply to a judge of the supreme court, in special term or in vacation, who shall thereupon, upon due notice to the counsel to the corporation of the city in which the lands so assessed are situated, proceed forthwith to hear the proofs and allegations of the parties.

"Sec. 2. If, upon such hearing, it shall appear that the alleged fraud or irregularity has been committed the said assessments shall be vacated, and the lien created thereby, or by any subsequent proceedings, shall cease.

"Sec. 3. On the production of the certificate of the judge before whom the proceedings shall be had that a judgment vacating any assessment has been made by him, it shall be the duty of the officer having charge of the assessment lists to cancel thereon the assessments so vacated and all proceedings under the same.

"Sec. 4. Any person applying for relief, under the provisions of this act, may embrace in one proceeding any or all assessments, for local improvements, in which he is interested.

"Sec. 5. Any lands which may be discharged from any lien for an assessment for any local improvement, may be again assessed, in the manner now provided by law, for such amount as would have been justly chargeable if fraud or irregularity had not been committed; but the amount so assessed shall be a lien on said lands until paid, and shall be collectible in the manner now provided by law for the collection of assessments, but all proceedings to make a new assessment shall be at the expense of the corporation of the city in which the lands may be situated.

"Sec. 6. This act shall take effect immediately."

The object of this act was to allow the summary vacation of an assessment where there was any fraud or irregularity therein. This act is the foundation of the sections in the Charter referred to below, and also of the corresponding sections in the Consolidation Act.

It was found, however, in practice, that the act as construed by the courts resulted in the vacation of

numerous assessments for technical reasons, and the act was altogether too broad and afforded too little protection to the City. Hence the Legislature restricted the remedy by enacting what were practically amendments of the act.

The first one of importance was section 7 of chapter 580 of the Laws of 1872. This act was amended by chapter 313 of the Laws of 1874. This amended act is substantially identical with section 960 of the Charter, except that the last clause in the section of the Charter relating to sales (which, of course, is immaterial here), was not in the Act of 1874.

In the year 1874 another amendment also was made by chapter 312 of the laws of that year, striking out from the first section of the Act of 1858 the words, "or legal irregularity," also striking out from the second section the words, "or irregularity." This act also introduced a provision abolishing the remedy by bill in equity, which provision was incorporated into section 897 of the Consolidation Act, which is now section 958 of the Charter.

The evil arising from the vacation and reduction of assessments was still so great that it became necessary to appeal to the Legislature again, and the result was that chapter 550 of the Laws of 1880 was enacted. That act created a tribunal known as the Assessment Commission, which was enacted to give relief as to the old assessments and to restrict the power of the Court in new cases to very narrow limits, and it is from the twelfth section of that act that the section on which the City relies on this case was taken, to wit, section 962 of the Greater New York Charter, printed in full on pages 20 and 21 of this brief as well as in the appendix.

The next legislation on the subject was the Consolidation Act, in which the various provisions of law

which we have referred to above were codified and re-enacted.

The provisions of the Charter are substantially the same in all respects material to the present case as the Consolidation Act. Section 958 of the Charter is the same as section 897 of the Consolidation Act; section 959 of the Charter is substantially the same as sections 898 and 900 of the Consolidation Act, the latter section being added to the former one. Section 960 of the Charter is almost the same as section 899 of the Consolidation Act; section 961 of the Charter is the same as 901 of the Consolidation Act; section 902 of the Consolidation Act was taken from chapter 550 of the Laws of 1880 and was omitted from the Charter because obsolete; section 962 of the Charter is substantially the same as section 903 of the Consolidation Act before the amendment thereof by chapter 613 of the Laws of 1895; section 963 of the Charter is the same as section 904 of the Consolidation Act; section 964 is the same as section 905 of the Consolidation Act.

We therefore find that, except as to certain temporary provisions which have now become obsolete, the Charter and the Consolidation Act are substantially the same.

It is evident from what we have shown above that the incongruity between the sections 959 and 962 of the Charter arises from the fact that the restriction of remedies, established in 1874, have been continued in the Consolidation Act and in the Charter, although they are really superfluous after the enactment of chapter 550 of the Laws of 1880. If, therefore, we go back to the statutes which were codified above by the Charter and by the Consolidation Act, we find that the provision on which we rely comes from the Act of 1880, which is the latest independent act, so that if, in any way, it is inconsistent with the previous act it repeals

the former; and if it is necessary to go to that length in considering the Charter, section 962, being the later section, will repeal the former section, to wit, section 959, the familiar principle being that the latter section, in such case, is considered the later expression of opinion by the Legislature and is controlling.

In the case of the Elm Street Widening, Mr. Justice Patterson, on the motion for the appointment of Commissioners, had occasion to consider a case much more extreme than the present one.

He wrote as follows:

"The question then arises as to the sufficiency of the provisions of the Consolidation Act referred to to secure the payment to the property-owner of the compensation to which he is entitled, and at the outset of that inquiry it is claimed that section 992 of that act, as amended in 1893, and as it now reads, is so defective and contradictory in its provisions that a property-owner would not be sure of a prompt and complete remedy, but might be subjected to the delays and uncertainties attending doubtful constructions of ambiguous, contradictory and mutually destructive provisions of that section. It is apparent that this section bears the stamp of slovenly legislation. In one and the same section it is provided that the property-owner may have an action for his award, and also that he shall not have an action but another proceeding. To those acquainted with the method of preparing for legislative consideration enactments amendatory of existing statutes, this contradiction is easily accounted for; but the fact remains that, as the section reads, there are two inconsistent provisions. One does not, however, by necessary legal interpretation, nullify the other, nor can there be any doubt whatever of the legislative intent. An inspection of the prior statute and an understanding of what the Legislature proposed

to accomplish by the amendment of 1893 will show that it was intended that the provisions concerning an action should be superseded by those furnishing the more summary and expeditious remedy by mandamus. Under such circumstances the rule of construction is well settled, although it is one only to be resorted to in extreme cases and where all efforts to reconcile conflicting provisions are futile; and such is the case here.

"The rule referred to is: 'If the latter part of a statute be repugnant to the former part thereof, it shall stand; and so far as it is repugnant, be a repeal of the former part, because it was last agreed to by the makers of the statute' (quoted from Bacon's Abridgment in Harrington *vs.* Trustees of Rochester, 10 Wend., 547), and in Sedgwick on Statutory Limiations it is stated in the same words."

This opinion was rendered after full argument and much consideration and is only reported, as far as we know, in The New York Law Journal of February 8, 1895 (page 1163). No appeal was taken, nor has the correctness of the decision been questioned by any Court, so far as we can ascertain.

II.

IT IS NOT TRUE THAT THE PROPOSITION CONTAINED IN THE FIRST SUB-DIVISION LEAVES THE PETITIONERS WITHOUT REMEDY, SUPPOSING THE ASSESSMENT TO BE ILLEGAL.

It may be urged that, if our contention is correct, the petitioners will be in the position of having had an illegal assessment imposed upon their property, and not be able to get rid of it, and be without remedy.

In this connection, we beg to refer again to the quotation, from *Matter of Smith*, 99 N. Y., 424, printed above (pp. 22 and 23).

The argument on this question was presented years ago, and came before the Court of Appeals in *Lennon* vs. *The Mayor, etc.*, 55 N. Y., 361.

In that case, it appeared that the assessment was illegal and void, and the plaintiff sought, therefore, to restrain the sale of his property for the non-payment of the assessment, and to have the sale and assessment declared void and vacated. The following is from the opinion of the Court in that case, written by Judge Rapallo:

"It was competent for the Legislature to deprive the courts of the power to give this relief, and the parties of the benefit of this form of remedy. The mere abortive attempt to impose the assessment and the outstanding record thereof, did not deprive the plaintiffs of any of their property; and although inconvenient to an owner to have an apparent lien upon his land, yet he has no such constitutional right to the aid of a court of equity to remove such cloud upon his title that the Legislature may not deprive him of that particular remedy. It is only when the pretended lien is sought to be enforced by the taking of his property, that the owner is protected by the Constitution. If the assessment in question has not been effectually validated, the plaintiffs may resist its collection, or the title of any purchaser who may claim, by virtue of a sale had under it. Their constitutional rights will then come directly in question. But no such right is violated by precluding them from taking the initiative to remove the apparent lien upon their property."

Now let us apply that decision to the present case. If it were conceded, for the sake of argument, that the assessment is illegal, the petitioners would not be deprived of all remedy by the denial of this motion. Their property would not be taken from them, nor could it be taken from them, if the assessment is illegal, for the

Constitution, as shown in the *Lennon* case, would always prevent such a result. Suppose the present assessments are illegal, and that the order denying the motion to vacate is affirmed, what will result to the railroad companies? They are in possession of the property, under the deeds through which they claim ownership, and they are not bound to pay the assessment. If the City should try to enforce payment, it would be obliged either to bring an action for money due as a personal claim against the railroad companies, or it would have to take proceedings to sell the property for the non-payment of the assessment.

If the City should bring suit against the companies, they could always set up the illegality of the assessment, and hence would defeat the City's claim.

If the City should take proceedings to sell the property for the non-payment of the assessment, and the railroad companies should simply remain inactive, a lease would eventually be delivered by the City to the purchaser, but that would not put the purchaser in possession of the property. It would be necessary for him to bring an ejectment suit against the railroad companies and to rely on his lease. That suit the railroad companies could always defeat, because they could show that the assessment was illegal, and hence that everything, including the lease founded thereon, would be invalid. Thus the City could not enforce the collection of the assessment, and the railroad companies could not be deprived of their property. They would thus not be without remedy, and their rights would not have been violated if the construction of the statute for which we contend is sustained, as was held in the Lennon case.

The following may also be observed: If the City should take such action as would be considered compulsion on its part, and the plaintiffs should pay the assessment under compulsion, the railroad companies

could recover the money paid in an action for that purpose, on the authority of *Tripler* vs. *The Mayor, etc.*, 125 N. Y., 617 (and after a new trial 139 N. Y., 1), *Poth* vs. *The Mayor, etc.*, 151 N. Y., 16, and similar cases.

III.

IF IT SHOULD BE THOUGHT NECESSARY TO CONSIDER THE LEGALITY OF THE ASSESSMENT, THEN IT IS URGED THAT THE PETITIONERS HAVE ENTIRELY FAILED TO SHOW THAT THE ASSESSMENT IS ILLEGAL.

As stated above, these assessments have been imposed upon real estate belonging to the railroad companies. It appears that this real estate is owned by them in fee simple. There is nothing to prevent the railroads from selling it, should they choose to do so. Only a part of the land is used for railroad purposes. The rest is merely land in the same situation as any other land in the vicinity upon which the railroad companies could erect buildings, or which they could sell for any purposes at any time.

As to the part of the land on which the railroad tracks are laid, running through the cut, this land is also owned by the railroad companies in fee simple, and it is not at all impossible that, at some time, the railroad companies might cease to use this land for railroad purposes, and might sell it for any uses to which real estate may be put.

In fact, as their own engineers admitted, on examination, it would be perfectly feasible to construct buildings, which could be used for general purposes, over the cut through which the railroad companies' trains could continue to run, without seriously interfering with the use thereof by the railroad trains.

In fact, several of the railroad's own stations are built over this cut, and are buildings on or over the

land on which the tracks are laid, used for the business of the railroad.

The following appears in the record at page 17, from the testimony of Mr. Haviland:

> "The two nearest stations of the railroad to these improvements are, one at Wendover avenue near its southerly end, and one at Tremont avenue at the extreme northerly end of the area of assessment of the improvement. These streets upon which these improvements were constructed are part of the street system leading to and from these stations, and the avenue is contiguous to the railroad on the easterly side; these stations are passenger stations and certain trains of the petitioners stop for the receiving and discharging of passengers at certain times, and a person coming to or going from one of these stations would or could pass over these roads."

The railroads would thus seem to be particularly benefited by the building of suitable means of access to their stations. From the passengers and freight which come and go therefrom the railroad derives a part of its profit. The Assessors, and the Appellate Tribunal of the Board of Assessors, to wit, the Board of Revision of Assessments, the members of which are sworn officers of the City, have, in the exercise of their special functions, determined that the railroad lands have been benefited to the extent of the assessment imposed. Their decisions and conclusions are, of course, entitled to the greatest weight, and the Court should not interfere in them except in the clearest case.

The Court, however, is here asked to nullify the action of these two tribunals, specially charged by law with the duty of imposing assessments according to benefit, on the testimony of two employees of the rail-

road companies; one of them, Arthur Haviland, a civil engineer, now and for a long time in the employ of the railroad companies; the other, Edgar Van Etten, general superintendent of the companies.

The witnesses testified that the total assessment is in excess of the fair value of the improvement; that is to say, that the fair value of the improvement to the railroad companies is nothing. The line of examination was duly objected to, and the point clearly made that the words, "The fair value of the improvements," as used in the statute, means the fair cost to the City of New York of the actual work of construction. The words of the statute are, "The fair value, or fair cost," and above, in the same statute, it is provided that an assessment can only be reduced to the extent of the excess in dollars and cents caused by fraud or substantial error. That this is the meaning of the statute is clearly shown in *Matter of Smith*, 99 *N. Y.*, 424, which we have cited above. It is plain, from the statute, and the decisions to which we have referred, that it was the intention of the Legislature to restrict the power of the Court in the present form of procedure to reducing an assessment in a single case, where the cost of the work was excessive. Where that was the case the Court should reduce the assessment to such a sum as would represent a fair cost, if the assessment was illegal, and if, for any reason, whether from lack of power to undertake the work or because it was of no benefit to the property assessed, there could be no remedy in this form of procedure, and such has been the practical construction which has been put upon the statute for many years.

The whole case of the petitioners rests on the testimony of two employees of the company, who swore that, in their opinion, the land of the companies is not benefited by the improvements, so that, according to the petitioners' theory, any assessment in the City of New

York should be vacated, provided you can get two witnesses, even agents or employees of the petitioner, to swear that, in their opinion, the assessment does not benefit the property. If such a theory were to prevail, the Courts would have to vacate every assessment made in the City of New York.

It would seem that the opinions of the five assessors and the three members of the Board of Revision should outweigh the opinions of the two employees of the railroad.

SECOND POINT.

Turning now to the attempted application of the Federal Constitution, laws, and jurisdiction of the Supreme Court of the United States to this case, we urge that the writ should be dismissed for the reason that a case is not made out by the record within the meaning of section 709 of the United States Revised Statutes and the decisions of this court thereunder.

The learned Counsel for the railroad companies attempt to bring the case before this court and to persuade it to overturn the decisions of the three courts of the State of New York, and the local procedure that has been in operation for a long period of years by holding that the system is in violation of the following clause from the Fourteenth Amendment to the Constitution of the United States, to wit, "NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW."

They invoke section 709 of the United States Revised Statutes as to the jurisdiction of the Supreme Court in respect to judgments or decrees of State Courts on writs of error.

The material parts of this section are as follows:

> "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may at their discretion award execution, or remand the same to the court from which it was removed by the writ."

We have shown at length under our statement of facts that no federal question was raised by the railroad companies in the course of the procedure terminating with the confirmation of the assessments; that is, neither before the Board of Assessors nor before the Board of Revision was there any hint that the petitioners objected to the proposed assessments on this ground.

Furthermore, when the question came before the Court at Special Term in the initial step before that Court, to wit, the petition, not a word was said or hint given that the assessments were attacked as unconstitutional. Nothing is said either in the opinion of the Appellate Division nor in the memorandum of the Court of Appeals whatever upon this point. The only ground for claiming that a federal question was raised at all is that it appears from the certificates of Presiding Justice Van Brunt and Chief Judge Parker that *in*

the briefs for the railroad companies before their respective courts certain statements were made. But even in those statements there is no distinct reference to the Federal Constitution. Their argument rather was that a construction of certain State statutes contrary to their contention, would result in depriving them of all remedy and thus be violative of section 6 of Article 1 of the New York State Constitution which, like the Federal Constitution, also provides that no person shall "be deprived of life, liberty or property without due process of law," and hence that such a construction should not be favored.

This is a legitimate argument in itself, but very different from urging that the State statutes are as matter of fact violative of the Federal Constitution.

This attempt to have the State statutes declared unconstitutional is, we believe, an afterthought subsequent to the decision of the Court of Appeals.

Before citing cases under this point we call attention to the following:

(1) Section 709 of the Revised Statutes requires, among other things, that the judgment or decree must be in a *suit*.

But, as we have already stated, the present proceeding is not a suit in the technical sense, nor in the sense that the word is used either in law or equity. Nor is it a controversy arising in an application for, for instance, one of the great common law writs like the writ of mandamus or writ of certiorari, or writ of habeas corpus, but, as we have urged, the controversy arises under certain special peculiar provisions of statute in which the courts can proceed only in a narrow restricted manner and can only give certain relief, nor does their action make the rights of the petitioners *res adjudicata*. The action of the State courts

is rather in the nature of an interlocutory order or decree.

(2) Section 709 of the Revised Statutes also requires, among other things, that the judgment or decree shall have been rendered in the highest court of a State.

It is true that the Court of Appeals, in which this decision was rendered, is the highest court in the State, and that the Supreme Court is the highest court of first instance, and having general jurisdiction in law and in equity, but it is not true that either the Court of Appeals or the Supreme Court, *in this case*, acts as a court of general jurisdiction, because, under the statutes, they can give relief only under certain conditions. They cannot vacate the assessments or give relief simply because they are illegal. They therefore are in reality, so far as this litigation is concerned, courts of limited jurisdiction. The principle underlying section 709 of the Revised Statutes is, it seems to us, that the decision must have been an adjudication upon the rights of an individual in regard to the subject matter rendered by the highest court of the State *acting as a court of full, general jurisdiction, applying the principal of common law and equity and the statutory law peculiar to the State.*

(3) Section 709 of the Revised Statutes requires among other things that the judgment or decree must be final.

We submit that the decree or judgment if such it be called is not a final decree or judgment in the sense in which that word is used in the said section. In fact, there is no judgment or decree at all in the technical sense, but only an order or rule. The judgment or decree is final in the sense that it terminates the particular proceeding, but it is not final in the sense that it determines the rights of the parties to the controversy. It is not final in the

sense that it determines that the assessment is legal. There is nothing to prevent the railroad companies bringing a suit to remove this assessment as a cloud upon title, if they are right in their contention that the statutes which purport to deprive them of this right are unconstitutional. Should they pay the assessments under compulsion, there is nothing to prevent their bringing suit to recover the amount paid, if the assessment is illegal. Should they decline to pay, and efforts be made to force the collection of the assessment, they could always defeat a claimant to their land in an ejectment suit on the ground of illegality of the assessment.

The so-called judgment or decree, therefore, in this case, cannot be said to be final, in the sense that it is a final disposition of the railroad companies' rights. It is merely a denial of a particular request made under particular restrictions, or, as said above, it is in the nature of an interlocutory order or decree.

We therefore submit that the case has not been brought within the technical requirements of section 709 of the Revised Statutes, neither in letter nor in spirit; that no case has been presented of which this Court has jurisdiction and hence that the writ should be dismissed for this reason alone.

We will refer briefly to a few decisions of this Court:

The Federal question was not raised at the proper time and manner below.

Duncan vs. *Missouri*, 152 U. S., 377.
Eastern Building Association vs. *Welling*, 181 U. S., 47.
Columbia Water Power Co. vs. *Columbia Electric Co.*, 172 U. S., 475.
Leeper vs. *Texas*, 139 U. S., 462.
Yazoo and Miss. R. Co. vs. *Adams*, 180 U. S., 1.

The error must appear on the face of the record.

Miller vs. *Cornwall R. Co.*, 168 U. S., 131.

A writ of error to a State court brings before the Supreme Court only the federal question in the case.

Ashley vs. *Ryan*, 153 U. S., 436.

An order upon a return to a writ of habeas corpus is not a final judgment.

Clarke vs. *McDade*, 165 U. S., 168.

Neither is a judgment of the Supreme Court of the State final which reverses an order overruling a demurrer or remands the case for further proceedings.

Great Western Telegraph Co. vs. *Burnham*, 162 U. S., 339.

Union Mutual Life Ins. Co. vs. *Kirchoff*, 160 U. S., 374.

The decision of the highest court of the State ordering a lower State court to discharge a rule for contempt is not a final judgment.

Newport Light Co. vs. *Newport*, 151 U. S., 527.

Neither is an order overruling a motion to quash an injunction.

Loeber vs. *Schroeder*, 149 U. S., 580.

Where the State Supreme Court remanded a cause for further proceedings the judgment was held not final.

Rice vs. *Sanger*, 144 U. S., 197.

Neither is the judgment of the State's Supreme Court merely affirming an interlocutory order of the lower court.

Meagher vs. *Minnesota Mfg. Co.*, 145 U. S., 608.

The order of the State Judge at Chambers in a habeas corpus case is not reviewable.

McKnight vs. *James*, 155 U. S., 685.

In *Newport Light Company* vs. *Newport*, 151 U. S., 527, it was held that the certificate of the Chief Justice of the State court does not of itself establish the existence of a federal question and confer jurisdiction upon the Supreme Court to re-examine the judgment complained of, and in the opinion in that case it was written as follows:

> "This Court must determine for itself whether the suit really involves any federal question which will entitle it to review the judgment of the State court under section 709 of the Revised Statutes."

See also *Yazoo & Miss. R. Co.* vs. *Adams*, 180 U. S., 41.

In *Turner* vs. *Richardson*, 180 U. S., 87, the head note is as follows:

> "It is again decided that to render a Federal
> "question available on writ of error from a State
> "court it must have been raised in the case before
> "judgment, and cannot be claimed for the first
> "time in a petition for rehearing."

THIRD POINT.

Under this point we shall assume, for the sake of argument, that we are wrong in our contentions elsewhere that the writ should be dismissed, and shall assume that the plaintiffs in error have presented a case which calls upon this Court to determine whether the decisions of the State courts are violative of the Federal Constitution. We shall urge that the decisions of the State courts should be affirmed.

The position of the railroad companies is that the decisions of the State courts would result in a violation of the Fourteenth Amendment of the Federal Constitution by depriving the plaintiffs in error of their property without due process of law.

They also rely upon section 709 of the United States Revised Statutes, which we have quoted under the previous point, to give this court jurisdiction.

In other words, they claim that the decisions of the State courts draw in question the validity of a statute of, or an authority exercised under, the State of New York, on the ground of its being repugnant to the Constitution of the United States, and the decisions are in favor of the validity of the State law. That is, they urge that certain State laws have been held valid, with the result that the Federal Constitution has been violated and that it follows that the decision deprives them of their property without due process of law.

I.

THE CONTENTION OF THE PLAINTIFFS IN ERROR ON THIS POINT HAS BEEN IN EFFECT DECIDED AGAINST THEM BY THE NEW YORK COURT OF APPEALS IN OTHER CASES.

The leading case is *Lennon* vs. *The Mayor*, 55 N. Y., 361 (1874).

Counsel cite no decisions of this court which they claim overrule or conflict with that decision, nor in fact do they cite any decisions of any courts to that effect. We think we may properly add that they cite in their elaborate and learned brief very few decisions of the Federal Courts and none having any direct bearing on the vital points of this case.

The decision in the *Lennon* case seems to us entirely applicable to the present case and decisive thereof, unless this court shall overrule that case and decide to the contrary. In fact, the present case is much less favorable to the view of our opponents than the *Lennon* case, for the reason, among others, that the latter was a suit in equity for an injunction and to have the assessment declared void and vacated, while the present case arises in a special proceeding.

As noted above, the provisions of the Federal Constitution and of the New York State Constitution to the effect that no person shall be deprived of his property without due process of law are substantially the same. The opinion of the Court of Appeals in the *Lennon* case is thus equivalent to an opinion by that court upon the said clause of the Federal Constitution.

We have already discussed the *Lennon* case under the second subdivision of our first point, but we will refer to it again in this connection.

In the *Lennon* case a certain assessment in the City of New York was concededly illegal, because certain resolutions had not been advertised as required by law. A certain statute which is a part of the system now before this court provided that no assessment should be vacated or set aside for omissions to advertise and thus deprived the court of power to grant the relief demanded, viz., "that the assessment be declared null and void and be canceled and discharged of record and the defendants perpetually restrained from

collecting it." This relief was demanded in an equity suit to restrain the City from executing a lease to the plaintiffs who had bought at the sale of the property for the non-payment of said assessment. It was argued that the said statute depriving the court of that power was in violation of the State Constitution. The following is from the opinion of the Court of Appeals, speaking through Judge Rapallo:

> "It was competent for the Legislature to deprieve the courts of the power to give this relief, and the parties of the benefit of this form of remedy. The mere abortive attempt to impose the assessment and the outstanding record thereof did not deprive the plaintiffs of any of their property; and although inconvenient to an owner to have an apparent lien upon his land, yet he has no such constitutional right, to the aid of a court of equity to remove such cloud upon his title, that the Legislature may not deprive him of that particular remedy. It is only when the pretended lien sought to be enforced by the taking of his property that the owner is protected by the Constitution. If the assessment in question has not been effectually validated the plaintiffs may resist its collection or the title of any purchaser who may claim by virtue of a sale had under it. Their constitutional rights will then come directly in question. But no such right is valid by precluding them from taking the initiative to remove the apparent lien upon their property. * * * The prohibition is general and not confined to any particular form of proceeding, and the saving clause at the end of the section indicates that the Legislature intended it to apply to suits as well as to special proceedings."

The Lennon case has been cited and followed in Eno vs. *The Mayor*, 68 N. Y., 214; *Dolan* vs. *The Mayor*, 62 N. Y., 472.

In *Chase* vs. *Chase*, 95 N. Y., 373, it was held that the restrictions upon the Court's power to vacate assessments by the special statutes under consideration applied to affirmative judicial proceedings, but did not affect the common law right of the property-owner to interpose a defense against a claim under the assumption that it was absolutely void.

It has also been held that these statutes do not apply to a case where the assessment has been paid, and therefore that if a man pays by compulsion an illegal assessment he can recover the same from the City in an action at law, and these statutes will afford the City no defense.

Jex vs. *The Mayor*, 103 N. Y., 213.
Poth vs. *The Mayor*, 151 N. Y., 14.

In *Scudder* vs. *The Mayor*, 146 N. Y., 245 (1895), the action was to enjoin the City from collecting the assessment, or attempting to enforce it in any way, and to have it declared void and uncollectible. The statute involved in the *Scudder* case, as forbidding an action in the nature of a bill in equity to remove a cloud upon title, was relied upon as a defense.

Judge Peckham wrote the opinion of the Court of Appeals holding the defense good. It was held that the said restriction was intended to confine property-owners in all cases of alleged void assessments to the remedy provided for in the act. The *Lennon* case was cited as an authority and held not to aid the plaintiff's case.

It thus appears that the *Lennon* case and the others just cited have established the doctrine, so far as the courts of the State of New York are concerned, that the very statutes now urged by the railroad companies to be unconstitutional have been held constitutional under the provisions of the New York State Con-

stitution, which are substantially identical with the Federal Constitution in the points now under consideration.

We venture to offer the following in support of these decisions, although as already indicated we do not find them disputed in any reported decisions:

II.

IT IS EVIDENT IN THE FIRST PLACE THAT THE RAILROAD COMPANIES HAVE NOT AS MATTER OF FACT BEEN DEPRIVED OF THEIR PROPERTY. THERE IS NO SUGGESTION THAT THEY ARE NOT IN POSSESSION OF THE LAND AND USING IT AS THEY PLEASE, AND IT STANDS ADMITTED, IN EFFECT, ON THE RECORD THAT THEY HAVE NOT PAID THE ASSESSMENTS AND THUS PARTED WITH ANY MONEY ON ACCOUNT THEREOF. IT MUST THEREFORE BE ADMITTED AT ONCE THAT THEY HAVE NOT AS YET BEEN DEPRIVED OF ANY OF THEIR PROPERTY, EITHER BY DUE OR UNDUE PROCESS OF LAW, OR BY FORCE OR IN ANY OTHER WAY.

III.

THEY CAN ONLY URGE, THEREFORE, THAT THE RESULT OF THIS DECISION MUST NECESSARILY BE THAT THEY WILL BE, OR MAY BE, DEPRIVED OF THEIR PROPERTY AT SOME TIME OR IN SOME MANNER. THAT SUCH CAN BE THE CASE WE DENY *in toto*.

It is necessary to consider this phase of the subject with the greatest care and to think clearly and distinctly about it.

Let us consider first what these statutes are. They have been described at length in our first point, and it will be only necessary here to state their substance

briefly. Down to the year 1858, if a property-owner claimed an assessment to be illegal, or to remove it from the records and cancel the lien thereof, his remedy was by bill in equity, to remove it as a cloud upon title.

This was found to be an unsatisfactory remedy, and hence chapter 338 of the Laws of 1858 was enacted, which established the procedure that was followed in this case. It is quoted in full under the first subdivision of our first point. This statute was intended to provide a summary method of vacating illegal asssessments.

It was found, however, that the Act of 1858 rendered the vacation of assessments too easy and resulted in great loss to the City of New York from the vacation of assessments because of technical irregularities and defects. Hence, various restrictions upon the power of the courts to vacate or reduce assessments were enacted by the Legislature, which it will not be necessary to describe in detail. The statutes thus finally got into the condition in which we now find them.

By chapter 312 of the Laws of 1874 the second section of the Act of 1858 was amended so as to read as follows:

> "If upon such hearing it shall appear that the alleged fraud or substantial error has been committed, the said assessment shall be vacated and the lien created thereby, or by any subsequent proceedings shall cease, and hereafter no suit or action in the nature of a bill in equity, or otherwise, shall be commenced for the vacation of any assessment in said city or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under the act hereby amended."

The latter part of this section is substantially the same as section 958 of the Charter quoted in full in the appendix.

The Legislature has therefore declared that one particular system shall be followed to obtain relief from illegal assessments by vacating or reducing them while they remain unpaid and an apparent lien. While they remain in that condition the property-owner has such remedy as the Legislature has seen fit to give him under the laws as construed by the State Courts. But whether this remedy is a satisfactory one or not it does not result in depriving the property-owner of his property, and therefore there is nothing unconstitutional about it. The Constitution does not protect a man against illegal charges and apparent liens which are not really such, but however unpleasant and inconvenient they may be his constitutional rights are not violated until he is actually deprived of his property without due process of law, or put in such position that he would or could be deprived of his property because he has no legal means of resisting the actual deprivation thereof. It is plain that the railroads have not been put in any such position in the present case.

IV.

LET US CONSIDER NEXT WHAT IS THE NATURE OF THESE ASSESSMENTS. ARE THEY JUDGMENTS, DECREES OR ORDERS UPON WHICH FOLLOW, AS MATTER OF RIGHT, SOME PROCESS OF THE COURT, LIKE AN EXECUTION OR AN ATTACHMENT, THE ENFORCEMENT OF WHICH THE RAILROAD COMPANIES COULD NOT LAWFULLY RESIST. NOT AT ALL. THEY ARE SIMPLY CHARGES AGAINST THESE COMPANIES UPON THE CITY'S BOOKS.

The situation is as though a board of audit had gone over the claims which the City may have against

various persons and had determined that the amount thereof against these railroad companies was the sums which the assessors have declared to be assessments upon the property. Calling them liens upon the railroad's real estate makes no difference in the nature of the assessments. They are not liens unless they are valid charges, and cannot be collected unless they are valid. Calling them liens does not operate to deprive the railroad companies of their property, because it cannot directly or indirectly result in taking their property away from the railroad companies unless, as matter of fact, they are valid liens.

The suggestion at page 13 of the Brief for the Railroad Companies that the lessee would take the risk of forfeiture of its lease wherein it covenanted to pay assessments is thus without force. It agreed to pay *valid* not invalid assessments, and whether the assessments were valid or not could always be determined in a suit between lessor and lessee.

V.

LET US NEXT CONSIDER HOW THESE CLAIMS ARE TO BE COLLECTED. WHAT CAN THE CITY DO TO ENFORCE PAYMENT?

There are only two courses which the City could take to collect the money: First, it might treat the assessments as personal claims against the railroad companies and bring suit thereon. If it should do so it would always be defeated in the litigation if the assessments are illegal, and hence no attachment or execution could issue under which the railroad companies could be deprived of their land.

The second remedy is by sale of the land for the nonpayment of the assessments. The principal sections of the Charter providing this remedy are printed in the

appendix. Now, let us see what would be the result if the City should attempt to collect the claim by use of that remedy. Under the system provided by these statutes the City of New York would have to sell the land to the person who would pay the assessment in consideration of receiving a lease of the land for the smallest number of years. Such person would eventually receive from the City a lease of the property for the period which he bid at the sale, *but this lease would not give him possession of the property. The railroad companies would still retain possession and could be ousted thereof only through an injunction following a judgment in an ejectment suit.*

But in the ejectment suit the railroad companies would merely have to show the illegality of the assessment, if it is illegal, whereupon the purchaser must be defeated in the ejectment suit, and hence judgment could not go against the railroad companies and they could not be deprived of their land as a result of the judgment.

It thus follows that the railroad companies have not and cannot be deprived of their property without due process of law as a result of the State Courts refusing to vacate these assessments, and hence that there is no ground for interfering with the decisions of the State courts under the Federal Constitution and laws.

FOURTH POINT.

The question whether the statute depriving a property-owner of the remedy of an action in equity to remove the assessment as a cloud upon title is not before this Court.

An argument of the counsel for the railroad companies is that the State statute, by depriving the property-owner aggrieved by the assessment of the ordinary remedy of an action in equity to remove the same as a cloud upon title, and restricting him to a particular statutory remedy which in this case has not resulted in any relief to him, has taken away all remedy, and that that is equivalent to taking away his property by force of an illegal assessment.

It is quite possible, as the counsel urge, that a case might arise where the taking away of all remedy for an illegal act would be equivalent to attempting to legalize an act which would result in a violation of the Constitution. No such case is presented here. We have shown in our previous point that no such result can follow the present case.

There is another phase of the subject which we have alluded to already. It is this. The decision of the State Courts in this particular suit denying the railroad companies' motion to vacate the assessments does not necessarily involve the said court's holding that the taking away of the remedy by bill in equity is constitutional. All that it is necessary to hold in order to sustain the decisions of the State courts is that under the State laws, as construed by the State courts, the said companies were not entitled to vacation of the assessments on the evidence submitted.

It might very well be that the Court should make this ruling and at the same time hold, if the question

were brought before it, that the statute taking away the remedy by bill in equity is unconstitutional. The two remedies might co-exist, and a property-owner might be left to his choice between the two. The remedy by petition being summary and inexpensive, might be preferred to the more cumbersome and expensive remedy of a suit in equity.

We urge, therefore, that the State courts have not necessarily held in this particular case that the act taking away the remedy by bill in equity is constitutional.

The proper way to test the question whether or not such a bill would lie is to file such a bill and proceed to litigate the matter in that form of action.

If the City raised the objection that the remedy by bill in equity had been taken away by statute, and the Court sustained the objection and therefore dismissed the suit, the case would then be presented whether or not the act was constitutional. It is apparent that this has not been done, and so we think that it can be properly urged that the question of the constitutionalty or unconstitutionalty of the said provision is not really before this Court.

FIFTH POINT.

A question of fact is raised which this Court will not examine.

Although we are not willing to rest our case upon this point alone, we nevertheless believe that it could be properly disposed of in this Court by holding that whether or not the railroad companies' land was benefited by this improvement is a question of fact which this Court will not review.

It is, of course, fundamental to the railroad companies' case that the assessment should be illegal. If it is a perfectly legal assessment they have nothing to complain of; the only ground on which they claim it to be illegal is that the street improvements were of no benefit to their property.

It has already been held by the Assessors and the Board of Revision that the railroad companies were benefited to the extent of the assessment, and it has been at least impliedly so held by the Special Term of the Supreme Court. We suppose it will not be necessary to cite cases to show that this Court will not review the facts in such a case for the purpose of reversing the action of the Courts below. *We have reviewed under the third subdivision of our first point the evidence in this case, but we respectfully suggest that what we have written there be read again in this connection.*

SIXTH POINT.

We thus arrive at the conclusion that the writ should be dismissed, or, if the case is in such a shape that this Court is called upon to review the decision of the State Courts, then the decision of those Courts should be affirmed.

New York, April 14, 1902.

GEORGE L. RIVES,
Corporation Counsel.

GEORGE L. STERLING,
Of Counsel.

APPENDIX.

Being a Reference to, and Quotations from, Certain Statutes of the State of New York.

The provisions of the New York State Statutes that have a bearing upon the subject, are as follows:

The Greater New York Charter.

This statute in the form applicable to this litigation is chapter 378 of the Laws of 1897 and is printed as the third volume of the Session Laws of the State of New York for the year 1897. This statute is a codification of the various special and local laws applicable to the City of New York after consolidation with the City of Brooklyn and other municipal corporations in the vicinity. This statute is divided into chapters, titles and sections. Chapter XVII. of this statute relates to Taxes and Assessments and the sections of this chapter are numbered from 884 to 1054. The assessments with which we have to deal are for local improvements other than those confirmed by a Court of Record. The other classes of assessments which are confirmed by a Court of Record arise from the exercise of the right of eminent domain in taking property for public uses, generally for the opening, widening and extending of streets.

The provisions as to local assessments other than those confirmed by a Court of Record, being the ones with which we are now dealing, are contained in title 2 of said chapter XVII., and in sections 942 to 954. The provisions as to vacating and modifying this class of assessments are contained in title 3 of said chapter, in sections 958 to 964. It is under the provisions of this title that the proceeding now before the Court is instituted.

In title 5 of this chapter (sections 1017 to 1054) are contained the provisions for compelling the collection and payment of taxes, assessments and water rates by the sale or rather leasing of the property assessed.

We give below in full as many of these provisions as it seems to us are involved in the present litigation.

Chapter 338 of the Laws of 1858, which originated the present system, is printed in full under the first subdivision of our first point and need not be repeated here.

As to the Board of Assessors.

Section 943.—"The mayor shall appoint five persons, who shall constitute the board of assessors. The salary of each member of said board shall be three thousand dollars a year. The said board shall be charged with the duty of making all assessments, other than those required by law to be confirmed by a court of record, for local improvements for which assessments may be legally imposed in any part of the City of New York as hereby constituted. The said board shall appoint a secretary and such clerks and subordinates as may be necessary, and shall fix their salaries, not exceeding in the aggregate the appropriation made for such purpose in the final estimate. The secretary, clerks and subordinates of the board of assessors, of the mayor, aldermen and commonalty of the city of New York, shall be and act as secretary, clerks and subordinates of the board of assessors herein provided for until and unless they shall be removed or superseded by the last-mentioned board of assessors."

As to the Board of Revision of Assessments.

Section 944.—"The comptroller, corporation counsel and president of the board of public improvements shall constitute the board of revision of assessments.

The said board, or a majority thereof, shall have and perform all the powers and duties relative to the revision, correction and confirmation of assessments specified in the various laws and ordinances relating to assessments in any part of the City of New York, as hereby constituted, other than assessments made by commissioners appointed by a court of record, and other than those confirmed by the board of assessors; said board shall have power to consider, on the merits, all objections made to any such assessment, and to subpœna and examine witnesses in relation thereto, and to confirm said assessment, or to refer the same back to the board of assessors for revisal and correction in such respects as it may determine. The revision of such assessments shall be made without delay, so that unless the same are referred back for revisal and correction they shall be confirmed within thirty days from the time they shall, respectively, be presented for confirmation, and if not so confirmed or referred back they shall be deemed to be confirmed at the expiration of thirty days from the time they shall be, respectively, so presented for confirmation. All such assessments, immediately upon confirmation, shall be transmitted to the comptroller for entry and collection."

CERTIFICATES ON WHICH ASSESSMENTS ARE MADE.

Section 946.—"All assessments shall be made by the board of assessors on the following certificates, to wit:

1. "The officer or head of the board or department charged with the execution of the work in question shall certify to the board of assessors the total amount of all the expenses which shall have been actually incurred by The City of New York on account thereof.

2. "The comptroller shall certify to the board of assessors the amount of the interest, at the legal rate,

upon the several instalments advanced or payments made on account of such work, from the time of such payment or advance by the city to a day sixty days after the date of such certificate. Thereafter the board of assessors shall assess upon the property benefited, in the manner authorized by law, the aggregate amount of such certificate, or such proportion thereof as is authorized by law, and the said board shall not in any way be enjoined, restrained, hindered or delayed in the performance of this duty, provided that nothing contained in this section shall be construed to affect the powers of the board of revision of assessments."

Limitations on Powers of Courts to Vacate Assessments.

Section 958.—"No suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under this title."

Petitions to Vacate Assessments Under Special Statutes.

Section 959.—"If in the proceedings relative to any assessment or assessments for local improvements, or in the proceedings to collect the same, any fraud or substantial error shall be alleged to have been committed, the party aggrieved thereby may apply to a justice of the supreme court in special term or in vacation, who shall thereupon, upon due notice to the corporation counsel, proceed forthwith to hear the proofs and allegations of the parties. If, upon such hearing, it shall appear that the alleged fraud or substantial error, other than such errors as are specified in the next section has been committed as provided in this title, the said assessment shall be vacated or modified,

and the lien created thereby, or by any subsequent proceedings, shall cease. If, upon such hearing, it shall appear that, by reason of any alleged irregularity, the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party be modified by deducting therefrom such sum, as is in the same proportion to such assessment as is the whole amount of such unlawful increase to the whole amount of the expense of such local improvement. Any order that may be made by a justice under authority of this section shall be filed in the office of the County Clerk of the county in which the lands are situated, and after the filing of a certified copy thereof with the officer having charge of the assessment, it shall be his duty to cancel or reduce the assessment as required by the order, or do any other act required thereby."

Assessments Not to be Set Aside for Certain Technicalities.

Section 960.—"No assessment heretofore made or imposed, or which shall hereafter be made or imposed for any local improvement or other public work, already completed or now being made or performed, or which shall hereafter be made, done, or performed, shall hereafter be vacated or set aside for or by reason of any omission to advertise, or irregularity in advertising any ordinance, resolution, notice, or other proceeding relative to, or authorizing the improvement or work for which such assessment shall have been made or imposed, or for proposals to do the work, or for or by reason of the omission of any officer to perform any duty imposed upon him, or for or by reason of any defect in the authority of any department or officer upon whose action the assessment shall be in any manner or to any extent dependent, or for or by reason of any omission to comply with or carry out any detail

of any law or ordinance, or for or by reason of any irregularity or technicality, except only in cases in which fraud shall be shown and in case of an assessment for repaving any street or public place upon property for which an assessment has once been paid for paving the same street or public place; and all property in said city benefited by any improvement or other public work already completed, or now being made or performed, and hereafter made, done, or performed, except as aforesaid, shall be liable to assessment for such improvement or work, and all assessments for any such improvement or other public work shall be valid and binding notwithstanding any such omission, irregularity, defect in authority, or technicality. No assessment shall be vacated by reason of fraud or irregularity in the proceedings to collect the same by sale of the assessed premises; but, upon proof of such fraud or irregularity, such sale shall be set aside and the respective rights and liabilities of the assessed person and of The City of New York shall become and be the same as if such sale had not been made."

POWER OF COURT TO VACATE OR REDUCE ASSESSMENTS LIMITED.

Section 962.—"No court shall vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property for any local improvement, otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment, which is equivalent to the fair value or fair cost of any actual local improvement, with interest at the rate of three per centum per annum from the date of confirmation to the date of the final order of reduction, and seven per centum thereafter, be dis-

turbed for any cause. The provisions of this section shall apply to actions to recover money paid for assessments, and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement."

STATUTE OF LIMITATIONS.

Section 963.—"All proceedings to vacate or reduce assessments in the City of New York must be brought within one year after the confirmation thereof."

TAXES, ASSESSMENTS AND WATER RENTS TO BE LIENS.

Section 1017.—"All taxes and all assessments for local improvements, and all water rents, and the interest and charges thereon, which may, in the City of New York, as by this act constituted, hereafter be laid or may have heretofore been laid, upon any real estate now in said city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges. No assessments for any local improvement shall be deemed to be fully confirmed, so as to be due and be a lien upon the property included in the assessment, until the title thereof, with the date of confirmation shall be entered with the date of such entry, in a record of the titles of assessments confirmed, to be kept in the office of the collector of assessments and arrears."

NOTICE OF CONFIRMATION OF ASSESSMENTS TO BE PUBLISHED.

Section 1018.—"It shall be the duty of the comptroller to give public notice, by advertisement, for at least ten days, in the 'City Record' and the corporation newspapers, duly designated for any borough in which the property is situated, immediately after the confirmation of any assessment for a local improvement, that the same has been confirmed, specifying the

title of such assessment, and the date of its confirmation, and also the date of entry in the record of titles of assessments kept in the office for the collection of assessments and arrears of taxes and assessments, and of water rents, notifying all persons, owners of property affected by any such assessments, that unless the amount assessed for benefit on any person or property shall be paid within sixty days after the date of said entry of any such assessment, interest shall be thereafter collected thereon as provided in the following section; and all provisions of law or ordinance requiring any different or other notice of assessments and interest thereon, are hereby repealed."

INTEREST TO BE CHARGED.

Section 1019.—"If any such assessment shall remain unpaid for the period of sixty days after the date of entry thereof on the said record of titles of assessments, it shall be the duty of the officer authorized to collect and receive the amount of such assessments to charge, collect and receive interest thereon, at the rate of seven per centum per annum, to be calculated from the date of such entry to the date of payment."

RATE OF INTEREST.

Section 1020.—"Interest shall hereafter be charged and collected at the rate of seven per centum per annum on all arrears of taxes and assessments returned to the collector of assessments and arrears from the time they become due until the date of payment, or in case a sale has taken place, as provided in section ten hundred and twenty-seven, until the date of the certificate mentioned in said section, and on the rents and charges for water from the time the taxes become due, to which they may be added as required by section ten hundred and twenty-five, until the same date respectively."

Sales of Lands for Non-payment of Taxes and Assessments—Procedure.

Section 1027.—" Whenever any tax on lands or tenements, or any assessment on lands or tenements for local improvements shall remain unpaid for the term of three years from the time the same shall have been confirmed, and also whenever any rents for water in said city shall have been due and unpaid for the term of four years from the time the same shall have been due, it shall and may be lawful, for the collector of assessments and arrears under the direction of the comptroller to advertise the said lands and tenements or any of them for sale, and by such advertisement the owner or owners of such lands and tenements respectively shall be required to pay the amount of such tax, assessment or water rents so remaining unpaid, together with the interest thereon at the rate of seven per centum per annum to the time of payment, with the charges of such notice and advertisement, to the said collector, and notice shall be given by such advertisement that if default shall be made in such payment, such lands and tenements will be sold at public auction at a day and place therein to be specified, for the lowest term of years at which any person or persons shall offer to take the same in consideration of advancing the said tax, assessment or water rents, as the case may be, and the interest thereon as aforesaid to the time of sale, and the charges of the above-mentioned notices and advertisement and all other costs and charges accrued thereon; and if, notwithstanding such notice, the owner or owners shall refuse or neglect to pay such tax, assessment or water rents, with the interests as aforesaid, and the charges attending such notice and advertisement, then it shall and may be lawful for the said collector, under the direction of the said comptroller, to cause such lands and tenements to be sold at public auction for a term of years, for the purpose and in

the manner expressed in the said advertisement, and such sale shall be made on the day and at the place for that purpose mentioned in the said advertisement, and shall be continued from time to time, if necessary, until all the lands and tenements so advertised shall be sold; and the said collector shall give to the purchaser or purchasers of any such lands or tenements a certificate of sale in writing, describing the lands and tenements so purchased, the term of years for which the same shall have been sold, the sum paid therefor, and the time when the purchaser will be entitled to a lease of the said lands and tenements. But no houses or lots, or improved or unimproved lands, in the City of New York, shall be hereafter sold or leased at public auction for the non-payment of any tax, assessment or water rents which may be due thereon, unless notice of such sale shall have been published once in each week successively for three months in the *City Record* and the corporation newspapers, which advertisement shall contain, appended to said notice, a particular and detailed statement of the property to be sold for taxes, assessments or water rents; or the said detailed statement and description, instead of being published in the *City Record* and the corporation newspapers, shall, at the option of the said comptroller, be printed in a pamphlet, in which case copies of the pamphlet shall be deposited in the office of the said collector, and shall be delivered to any person applying therefor. And the notice provided for in this section to be given of the sale of houses and lots and improved and unimproved lands shall also state that the detailed statement of the taxes, assessments, or water rents, and the ownership of the property taxes assessed, and on which the water rents are unpaid, is published in the *City Record* and the corporation newspapers, or in a pamphlet, as the case may be, and that copies of the pamphlet are deposited in the office of the said collector, and will be delivered to any person

applying for the same. No other notice or demand of the tax assessment or water rent shall be required to authorize the sale of any lands and tenements as hereinbefore provided."

REDEMPTION LEASE TO BE EXECUTED TO PURCHASER.

Section 1041.—"The collector of assessments and arrears, under direction of the comptroller of the city, shall cause an advertisement to be published at least twice in each week for six weeks successively in the 'City Record' and the corporation newspapers, in such form as he shall deem best calculated to give notice of such sale, that unless the lands and tenements sold be redeemed by a certain day, they will be conveyed to the puchaser. If the person or persons claiming title to the said lands and tenements, or some other persons, shall not, within two year sfrom the date of the beforementioned certificate pay to the said collector, for the use of the purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, the sum mentioned in such certificate, together with the interest thereon, at the rate of fourteen per centum per annum, from the date of such certificate, the said comptroller in the name of the City of New York, at the expiration of the said two years, shall execute to the purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, a lease under the common seal of the city, of the lands and tenements so sold for such term of years as the same shall have been sold, and the execution thereof shall be witnessed by the said collector. At the time of receiving the lease the purchaser shall pay the sum of two dollars and fifty cents to the said collector for the expense of drawing said lease, and also the expense of advertising the notice to redeem; and all such leases executed by the said comptroller and witnessed by the said collector shall be presumptive evidence that the sale

and all proceedings prior thereto, from and including the assessments on said lands and tenements, for taxes or assessments or water rents, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular and according to the provisions of the statute in such cases made and provided; and such purchaser or purchasers, his, her or their heirs, executors, administrators, or assigns, shall, in virtue thereof and of this title, lawfully hold and enjoy the said lands and tenements in said lease mentioned for his, her, or their own proper use against the owner or owners thereof, and all claiming under him, her, or them, until such purchaser's term therein shall be fully complete and ended; and the said purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, shall be at liberty to remove all the buildings, or materials which he, she, or they shall erect or place thereon during the said term, within one month after the expiration of the said term, but leaving the lands and tenements, with the streets fronting the same in the order required by the regulations of the municipal assembly; provided that such lease shall not be executed and delivered until the expiration of six months after the publication of the notice last herein above mentioned."

Supreme Court of the United States.

No. 234.—October Term, 1901.

The New York Central and Hudson River Railroad Company et al., Plaintiffs in Error, vs. The City of New York. } In error to the Supreme Court of the State of New York.

[June 2, 1902.]

This was a petition of the New York Central and Hudson River Railroad Company, as lessee, and the New York and Harlem Railroad Company, as owner, to vacate certain assessments for regulating and grading, setting curbstones, paving and other improvements to Vanderbilt avenue East, in the city of New York, upon the ground that the property in question had not been, would not be, and could not be, benefited in any manner by the improvments.

The successive steps towards the proposed improvements were the adoption of resolutions by the local municipal legislature, directing the improvements; the ascertainment of their cost; the making of a contract for their construction; and, finally, the assessment of the benefits upon the property, which in one case amounted to $4,687.82 and in the other to $12,626.72. Petitioners filed before the board of assessors objections to both assessments upon the ground that they were unfair, unequal, inequitable and unjust, and greater than the amounts assessed upon surrounding property. The two proposed assessments with these objections were transmitted by the assessors to the board of revision, which confirmed them.

Thereupon the two railway companies filed this petition, setting up the facts above stated, and alleging that their lands assessed are held and occupied only and exclusively as a roadway upon which their tracks are laid, and over which their trains are run, and that there are no buildings or other improvements upon the land except such railway tracks; that the grade of Vanderbilt avenue is from ten to eighteen feet above the level of petitioners' tracks; that there is no possible access from the land of petitioners to Vanderbilt avenue, but, on the contrary, that the roadway was constructed under a contract between petitioners and the board of public parks, and was depressed to its present grade, and solid stone retaining walls built upon and along the easterly and westerly sides of said land, in order that access to and from public streets and avenues, including that part of Park avenue or Vanderbilt avenue East, should be

cut off and rendered impossible, and that no benefit could accrue to petitioners' lands by such improvements.

Petitioners prayed that the assessments might be vacated and the liens upon their lands discharged; but there is nowhere in the petition any claim of a Federal right, or a violation of the Constitution of the United States in any particular.

The case coming on to be heard before a special term of the Supreme Court, held on July 21, 1899, upon the petition, and testimony taken by consent, it was ordered that the prayer of the petition be denied. The railroad companies thereupon appealed to the appellate division of the Supreme Court, which affirmed the order of the special term. An appeal was taken to the Court of Appeals, where the order of the appellate division was affirmed, and the case remitted to the Supreme Court, which ordered the judgment of the Court of Appeals to be made the order and judgment of that court. No written opinion was filed by the Court of Appeals.

Whereupon the railway companies applied for and were allowed a writ of error from this court.

Mr. Justice BROWN delivered the opinion of the Court.

Petitioners' rely in this case upon the fact that the property assessed consists solely of a roadway through Park avenue or Vanderbilt avenue East, depressed from ten to eighteen feet below the grade of the street, the sides of which depression are held in place, and faced by a retaining wall, surmounted by an iron fence, whereby all access to and from the roadway to the street is rendered impossible, except at the intersection of side streets, where bridges are built for the accommodation of traffic. Their claim is that no possible benefit had, would or could inure to the benefit of the railway companies by the construction of the proposed improvements; and all the oral testimony tended to show that fact. The roadway was in fact nothing more than a tunnel through the avenue, open at the top, and differed only in that particular from an ordinary railway tunnel or subway wholly beneath the surface. The only evidence to the contrary was the order of the board of assessors and the board of revision making the assessment, presumably founded upon the opinion that some benefit must have accrued to the roads.

The only opinion delivered was that of the appellate division, which held that, under the city charter, there was no power in the court in any event to vacate an assessment for local improvements; that while the court was given power to reduce an assessment, it was deprived of the power to vacate it. "It may correct an error, but it cannot entirely wipe out the assessment itself," although it was intimated that the property

owner might still "challenge the validity of the assessment, whenever his property is assessed under it, or it is made the foundation of proceedings against him."

The difficulty with the position of the railway companies in this court is that no Federal question was raised in their petition—the only pleading filed by them—and they are forced to rely upon a copy of their printed brief submitted in the Court of Appeals, and certified by the Chief Judge of that court as containing certain matters. The only allusion, however, in this brief to a possible Federal question is that contained in the following extracts:

"Legislative enactment is to be interpreted and construed upon the hypothesis that the legislature has, in its enactments, had due regard for these limitations upon its power, and that interpretation to be given to the language promulgated by it which will render it conformable to, rather than violative of, the rule of State and Federal Constitution.

"If, by prohibiting judicial review, the result of section 962 is to enable the assessors to assess property for local improvements without reference to the benefits conferred upon the property by such improvements, that section is unconstitutional. A statute which authorizes assessments for local improvements, other than in accordance with the benefits conferred, is unconstitutional and void. (*Norwood* v. *Baker*, 172 U. S. 269.) That case holds that the only principle justifying the levying of assessments for local improvements is 'that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvements.'"

Manifestly, this is not such a case of setting up and claiming a Federal right as is required by R. S. section 709, to invest this court with jurisdiction of a writ of error. In the case of *Zadig* v. *Baldwin*, (166 U. S. 485,) the contention that there was a Federal question raised below was contained only in an extract from the closing brief of counsel, presented to the Supreme Court of the State, in which such Federal question was discussed, and an oral assertion in the argument made to the Supreme Court of California that a claim under the Federal Constitution was presented. "But, manifestly," said the court, "the matters referred to form no part of the record, and are not adequate to create a Federal question, when no such question was necessarily decided below, and the record does not disclose that such decisions were set up or claimed in the proper manner in the courts of the State."

But assuming, without intimating an opinion to that effect, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the State, constitution was relied upon, and that such provision must be set forth. (*Porter* v. *Foley*, 24 How. 415; *Miller* v. *Cornwall R. R. Co.*, 168 U. S. 131; *Dewey* v. *Des Moines*, 173 U. S. 193; *Keokuk &c. Bridge Co.* v. *Illinois*, 175 U. S. 626; *Chapin* v. *Fye*, 179 U. S. 126.)

It is hardly necessary to say that the raising of such a question in the assignments of error in this court is insufficient. Not only was there no Federal question raised in the record, but the appellate division made no allusion to such a question, and dismissed the petition upon the ground that the charter of New York did not permit a question of benefit or no benefit to be raised in such a proceeding—a ground wholly independent of a Federal question.

The writ of error must, therefore, be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.